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No. 95-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

HON. JOHN F. GRADY, *et al.*
*Petitioners,*

v.

RHONE-POULENC RORER INC., *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITIONERS' APPENDIX

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**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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No. 94-3912

IN THE MATTER OF:
RHONE-POULENC RORER INCORPORATED, *et al.*,
*Petitioners.*

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Petition for a Writ of Mandamus to Hon.
John G. Grady, United States District Judge,
Northern District of Illinois, Eastern Division, in
*Wadleigh et al. v. Rhone-Poulenc Rorer Inc., et al.*
No. 93 C 5969

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Argued January 30, 1995---Decided March 16, 1995

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Before POSNER, *Chief Judge*, and BAUER and ROVNER, *Circuit Judges*.

POSNER, *Chief Judge*. Drug companies that manufacture blood solids are the defendants in a nationwide class action brought on behalf of hemophiliacs infected by the AIDS virus as a consequence of using the defendants' products. The defendants have filed with us a petition for mandamus, asking us to direct the district judge to rescind his order certifying the case as a class action. We have no *appellate* jurisdiction over that order. An order certifying a class is not a final decision within the meaning of 28 U.S.C. § 1291; it does not wind up the litigation in the district court. And, in part because it is reviewable (at least in principle--the importance of this qualification will appear

shortly) on appeal from the final decision in the case, it has been held not to fit any of the exceptions to the rule that confines federal appellate jurisdiction to final decisions. In short, as the Supreme Court made clear in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), and *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480-82, 98 S.Ct. 2451, 2453-54, 57 L.Ed.2d 364 (1978), it is not an appealable order. Those decisions involved the denial rather than the grant of motions for class certification, but the grant is no more final than the denial and no more within any of the exceptions to the final-decision rule. *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 208 (3d Cir.1990); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1802, pp. 484-86 (2d ed. 1986). Still, even nonappealable orders can be challenged by asking the court of appeals to mandamus the district court. Indeed, as a practical matter *only* such orders can be challenged by filing a petition for mandamus; an appealable order can be challenged only by appealing from it; the possibility of appealing would be a compelling reason for denying mandamus. For obvious reasons, however, mandamus is issued only in extraordinary cases. Otherwise, interlocutory orders would be appealable routinely, but with "appeal" renamed "mandamus." *Kerr v. United States District Court*, 426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976); *Eisenberg v. United States District Court*, 910 F.2d 374, 375 (7th Cir.1990).

How to cabin this too-powerful writ which if uncabined threatens to unravel the final-decision rule? By taking seriously the two conditions for the grant of a writ of mandamus. The first is that the challenged order not be *effectively* reviewable at the end of the case--in other words, that it inflict *irreparable* harm. *Kerr v. United States, supra*, 426 U.S. at 403, 96 S.Ct. at 2124; *In re Sandahl*, 980 F.2d 1118, 1119 (7th Cir.1992); *Eisenberg v. United States District Court, supra*, 910 F.2d at 375. The petitioner "must ordinarily demonstrate that something about the order, or its circumstances, would make an end-of-case appeal

ineffectual or leave legitimate interests unduly at risk." *In re Recticel Foam Corp.*, 859 F.2d 1000, 1005-06 (1st Cir.1988). Second, the order must so far exceed the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289, 108 S.Ct. 1133, 1143-44, 99 L.Ed.2d 296 (1988); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980) (per curiam); *United States v. Spilotro*, 884 F.2d 1003, 1006-07 (7th Cir.1989); *In re Sandahl, supra*, 980 F.2d at 1121; *Maloney v. Plunkett*, 854 F.2d 152 (7th Cir.1988). We shall not have to explore these gradations; it will be enough to consider whether the district judge's order can fairly be characterized as usurpative.

The set of orders in which both conditions are satisfied is small. It certainly is not coterminous with the set of orders certifying suits as class actions. For even though such orders often, perhaps typically, inflict irreparable injury on the defendants (just as orders denying class certification often, perhaps typically, inflict irreparable injury on the members of the class), irreparable injury is not sufficient for mandamus; there must also be an abuse of discretion that can fairly be characterized as gross, very clear, or unusually serious. But it is not an empty set. The point of cases like *Coopers & Lybrand* is that irreparable harm is not enough to make class certification orders *automatically* appealable under 28 U.S.C. § 1291, not that mandamus is never appropriate in a class certification setting. There is a big difference between saying that *all* class certification rulings are appealable as of right because they are final within the meaning of section 1291 (the position rejected in *Coopers & Lybrand*) and saying that a handful are--the handful in which the district judge committed a clear abuse of discretion. Mandamus has occasionally been granted to undo class certifications, *see, e.g., In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir.1990), and we are not aware that any case has held that

mandamus will *never* be granted in such cases. *See In re Catawba Indian Tribe*, 973 F.2d 1133, 1137 (4th Cir.1992); *DeMasi v. Weiss*, 669 F.2d 114, 117-19 and n. 6 (3d Cir.1982). The present case, as we shall see, is quite extraordinary when all its dimensions are apprehended. We shall also see that when mandamus is sought to protect the Seventh Amendment's right to a jury trial in federal civil cases, as in this case, the requirement of proving irreparable harm is relaxed.

The suit to which the petition for mandamus relates, *Wadleigh v. Rhone-Poulenc Rorer Inc.*, 157 F.R.D. 410 arises out of the infection of a substantial fraction of the hemophiliac population of this country by the AIDS virus because the blood supply was contaminated by the virus before the nature of the disease was well understood or adequate methods of screening the blood supply existed. The AIDS virus (HIV--human immunodeficiency virus) is transmitted by the exchange of bodily fluids, primarily semen and blood. Hemophiliacs depend on blood solids that contain the clotting factors whose absence defines their disease. These blood solids are concentrated from blood obtained from many donors. If just one of the donors is infected with the AIDS virus the probability that the blood solids manufactured in part from his blood will be infected is very high unless the blood is treated with heat to kill the virus. For general background, *see* Margaret W. Hilgartner, "AIDS and Hemophilia," 317 *New England Journal of Medicine* 1153 (1987); Leon W. Hoyer, "Hemophilia A," 330 *New England Journal of Medicine* 38 (1994); "U.S. CDC: HIV Cutting Lives Short in Hemophilia, Study Says," *AIDS Weekly*, Feb. 14, 1994.

First identified in 1981, AIDS was diagnosed in hemophiliacs beginning in 1982, and by 1984 the medical community agreed that the virus was transmitted by blood as well as by semen. That year it was demonstrated that treatment with heat could kill the virus in the blood supply and in the following year a reliable test for the presence of the virus in blood was developed. By this time, however, a large number of hemophiliacs had become infected. Since 1984 physicians have

been advised to place hemophiliacs on heat-treated blood solids, and since 1985 all blood donated for the manufacture of blood solids has been screened and supplies discovered to be HIV-positive have been discarded. Supplies that test negative still are heat-treated, because the test is not infallible and in particular may fail to detect the virus in persons who became infected within six months before taking the test.

The plaintiffs have presented evidence that 2,000 hemophiliacs have died of AIDS and that half or more of the remaining U.S. hemophiliac population of 20,000 may be HIV-positive. Unless there are dramatic breakthroughs in the treatment of HIV or AIDS, all infected persons will die from the disease. The reason so many are infected even though the supply of blood for the manufacture of blood solids (as for transfusions) has been safe since the mid-80s is that the disease has a very long incubation period; the median period for hemophiliacs may be as long as 11 years. Probably most of the hemophiliacs who are now HIV-positive, or have AIDS, or have died of AIDS were infected in the early 1980s, when the blood supply was contaminated.

Some 300 lawsuits, involving some 400 plaintiffs, have been filed, 60 percent of them in state courts, 40 percent in federal district courts under the diversity jurisdiction, seeking to impose tort liability on the defendants for the transmission of HIV to hemophiliacs in blood solids manufactured by the defendants. Obviously these 400 plaintiffs represent only a small fraction of the hemophiliacs (or their next of kin, in cases in which the hemophiliac has died) who are infected by HIV or have died of AIDS. One of the 300 cases is *Wadleigh*, filed in September 1993, the case that the district judge certified as a class action. Thirteen other cases have been tried already in various courts around the country, and the defendants have won twelve of them. All the cases brought in federal court (like *Wadleigh*)--cases brought under the diversity jurisdiction--have been consolidated for pretrial discovery in the Northern District of Illinois by the panel on multidistrict litigation.

The plaintiffs advance two principal theories of liability. The first is that before anyone had heard of AIDS or HIV, it was known that Hepatitis B, a lethal disease though less so than HIV-AIDS, could be transmitted either through blood transfusions or through injection of blood solids. The plaintiffs argue that due care with respect to the risk of infection with Hepatitis B required the defendants to take measures to purge that virus from their blood solids, whether by treating the blood they bought or by screening the donors--perhaps by refusing to deal with *paid* donors, known to be a class at high risk of being infected with Hepatitis B. The defendants' failure to take effective measures was, the plaintiffs claim, negligent. Had the defendants not been negligent, the plaintiffs further argue, hemophiliacs would have been protected not only against Hepatitis B but also, albeit fortuitously or as the plaintiffs put it "serendipitously," against HIV.

The plaintiffs' second theory of liability is more conventional. It is that the defendants, again negligently, dragged their heels in screening donors and taking other measures to prevent contamination of blood solids by HIV when they learned about the disease in the early 1980s. The plaintiffs have other theories of liability as well, including strict products liability, but it is not necessary for us to get into them.

The district judge did not think it feasible to certify *Wadleigh* as a class action for the adjudication of the entire controversy between the plaintiffs and the defendants. Fed.R.Civ.P. 23(b)(3). The differences in the date of infection alone of the thousands of potential class members would make such a procedure infeasible. Hemophiliacs infected before anyone knew about the contamination of blood solids by HIV could not rely on the second theory of liability, while hemophiliacs infected after the blood supply became safe (not perfectly safe, but nearly so) probably were not infected by any of the defendants' products. Instead the judge certified the suit "as a class action with respect to particular issues" only. Fed.R.Civ.P. 23(c)(4)(A). He explained this decision in an

opinion which implied that he did not envisage the entry of a final judgment but rather the rendition by a jury of a special verdict that would answer a number of questions bearing, perhaps decisively, on whether the defendants are negligent under either of the theories sketched above. If the special verdict found no negligence under either theory, that presumably would be the end of all the cases unless other theories of liability proved viable. If the special verdict found negligence, individual members of the class would then file individual tort suits in state and federal district courts around the nation and would use the special verdict, in conjunction with the doctrine of collateral estoppel, to block relitigation of the issue of negligence.

With all due respect for the district judge's commendable desire to experiment with an innovative procedure for streamlining the adjudication of this "mass tort," we believe that his plan so far exceeds the permissible bounds of discretion in the management of federal litigation as to compel us to intervene and order decertification. The plaintiffs' able counsel argues that we need not intervene now, that it will be time enough to intervene if and when a special verdict adverse to the defendants is entered and an appeal taken to us. But of course a verdict as such is not an appealable order. Only when a final judgment is entered, determining liability and assessing damages, will the case, including interim rulings such as the certification of certain issues in the case for determination in a class action, be appealable to us. Since without a final judgment the special verdict would not (with an exception noted later in this opinion) even have collateral estoppel effect, *Amcast Industrial Corp. v. Detrex Corp.*, 45 F.3d 155, 158 (7th Cir.1995), the district judge may have intended that the special verdict would be followed by a trial on any remaining liability issues, and on damages, limited to Wadleigh and the other named plaintiffs in the *Wadleigh* case. That trial would culminate in a final judgment, which would both be appealable to us and impart collateral estoppel effect to the special verdict. The members of the class, other than the named plaintiffs, would take the special verdict back to their

home districts and use it to limit the scope of the individual trials that would be necessary--for remember that the district judge has refused to certify the case as a class action for a final adjudication of the controversy between the class and the defendants--to determine each class member's actual entitlement to damages and in what amount.

We asked at argument whether the district judge indeed planned to enter a final judgment at least with respect to the named plaintiffs, so that the ruling on class certification could eventually be appealed. The plaintiffs' counsel relayed the question to the judge, who wrote them that he does envisage the eventual entry of a final judgment with regard to the named plaintiffs. This procedure for eliciting the judge's views was irregular. A judge against whom mandamus is sought is authorized to file a brief, Fed.R.App.P. 21(b), and Judge Grady had not done so. In effect the letter was his brief, but because it was filed out of time the petitioners had no chance to respond to it.

Nevertheless we shall assume in accordance with the judge's letter that eventually there will be a final judgment to review. Only it will come too late to provide effective relief to the defendants; and this is an important consideration in relation to the first condition for mandamus, that the challenged ruling of the district court have inflicted irreparable harm, which is to say harm that cannot be rectified by an appeal from the final judgment in the lawsuit. The reason that an appeal will come too late to provide effective relief for these defendants is the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them. Consider the situation that would obtain if the class had not been certified. The defendants would be facing 300 suits. More might be filed, but probably only a few more, because the statutes of limitations in the various states are rapidly expiring for potential plaintiffs. The blood supply has been safe since 1985. That is ten years ago. The risk to hemophiliacs of having become infected with HIV has been widely publicized; it is unlikely that many

hemophiliacs are unaware of it. Under the usual discovery statute of limitations, they would have to have taken steps years ago to determine their infection status, and having found out file suit within the limitations period running from the date of discovery, in order to preserve their rights.

Three hundred is not a trivial number of lawsuits. The potential damages in each one are great. But the defendants have won twelve of the first thirteen, and, if this is a representative sample, they are likely to win most of the remaining ones as well. Perhaps in the end, if class-action treatment is denied (it has been denied in all the other hemophiliac HIV suits in which class certification has been sought), they will be compelled to pay damages in only 25 cases, involving a potential liability of perhaps no more than $125 million altogether. These are guesses, of course, but they are at once conservative and usable for the limited purpose of comparing the situation that will face the defendants if the class certification stands. All of a sudden they will face thousands of plaintiffs. Many may already be barred by the statute of limitations, as we have suggested, though its further running was tolled by the filing of *Wadleigh* as a class action. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554, 94 S.Ct. 756, 766, 38 L.Ed.2d 713 (1974). (If the class is decertified, the statute of limitations will start running again. *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 627 (7th Cir.1986); *Barrett v. U.S. Civil Service Comm'n*, 439 F.Supp. 216, 218-19 (D.D.C.1977); cf. *American Pipe & Construction Co. v. Utah, supra*, 414 U.S. at 552, 561, 94 S.Ct. at 765, 770; *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354, 103 S.Ct. 2392, 2398, 76 L.Ed.2d 628 (1983)).

Suppose that 5,000 of the potential class members are not yet barred by the statute of limitations. And suppose the named plaintiffs in *Wadleigh* win the class portion of this case to the extent of establishing the defendants' liability under either of the two negligence theories. It is true that this would only be prima facie liability, that the defendants would have various defenses.

But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle. Milton Handler, "The Shift from Substantive to Procedural Innovations in Antitrust Suits," 71 *Column.L.Rev.* 1, 8-9 (1971); William Simon, "Class Actions--Useful Tool or Engine of Destruction," 55 F.R.D. 375 (1972); Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *9 Law & Soc'y Rev.* 95, 143 and n. 121 (1974); Charles D. Schoor, "Class Actions: The Right to Solicit," 16 *Santa Clara L.Rev.* 215, 239-40 and n. 82 (1976); Joseph Grundfest, "Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority," 107 *Harv.L.Rev.* 963, 973 n. 38 (1994); Lester Brickman, "On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyer's Rates of Return," 15 Cardozo L.Rev. 1755, 1780-82 (1994); Note, "Conflicts in Class Actions and Protection of Absent Class Members," *91 Yale L.J.* 590, 605 n. 67 (1982). If they settle, the class certification--the ruling that will have forced them to settle--will never be reviewed. *General Motors Corp. v. City of New York*, 501 F.2d 639, 657-58 (2d Cir.1974) (concurring opinion); cf. *Mars Steel Corp. v. Continental Illinois National Bank & Trust Co.*, 834 F.2d 677, 682-83 (7th Cir.1987). Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). Judicial concern about them is legitimate, not "sociological," as it was derisively termed in *In re Sugar Antitrust Litigation*, 559 F.2d 481, 483 n. 1 (9th Cir.1977).

The defendants did not mention their concern about settlement pressures until the oral argument of this appeal, so we should consider whether the argument is waived and we

therefore cannot consider it. If a party fails to present a ground for reversal, the appeals court will not supply it; this is the doctrine of waiver. *Hartmann v. Prudential Ins. Co.*, 9 F.3d 1207, 1214 (7th Cir.1993); *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir.1989); *Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1328 (7th Cir.1986). The doctrine is not that if the party fails to offer a particular reason for its position, the court cannot consider that reason. *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 820 (7th Cir.1994). Were that the rule, the role of an appellate court would be confined to weighing the reasons, pro and con a particular ground, that the parties happened to proffer. Appellate consideration so truncated could not produce durable rules to guide decision in future cases; judicial opinions would be impoverished if all they did were call balls and strikes. The defendants here properly asserted as the basis for mandamus the two necessary conditions: irreparable harm and clear violation of right. For obvious reasons they did not point out in support of the first condition that if mandamus is denied they will be forced to settle--for such an acknowledgment would greatly weaken them in any settlement negotiations. We should be realistic about what is feasible to put in a public brief.

We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts. We have yet to consider the balance. All that our discussion to this point has shown is that the first condition for the grant of mandamus--that the challenged ruling not be effectively reviewable at the end of the case--is fulfilled. The ruling will inflict irreparable harm; the next question is whether the ruling can fairly be described as usurpative. We have formulated this second condition as narrowly, as stringently, as can be, but even so formulated we think it is fulfilled. We do not mean to suggest that the district judge is engaged in a deliberate power-grab. We

have no reason to suppose that he *wants* to preside over an unwieldy class action. We believe that he was responding imaginatively and in the best of faith to the challenge that mass torts, graphically illustrated by the avalanche of asbestos litigation, pose for the federal courts. But the plan that he has devised for the HIV-hemophilia litigation exceeds the bounds of allowable judicial discretion. Three concerns, none of them necessarily sufficient in itself but cumulatively compelling, persuade us to this conclusion.

The first is a concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability, when it is entirely feasible to allow a final, authoritative determination of their liability for the colossal misfortune that has befallen the hemophiliac population to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions; and when, in addition, the preliminary indications are that the defendants are not liable for the grievous harm that has befallen the members of the class. These qualifications are important. In most class actions--and those the ones in which the rationale for the procedure is most compelling--individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation. That plainly is not the situation here. A notable feature of this case, and one that has not been remarked upon or encountered, so far as we are aware, in previous cases, is the demonstrated great likelihood that the plaintiffs' claims, despite their human appeal, lack legal merit. This is the inference from the defendants' having won 92.3 percent (12/13) of the cases to have gone to judgment. Granted, thirteen is a small sample and further trials, if they are held, may alter the pattern that the sample reveals. But whether they do or not, the result will be robust if these further trials are permitted to go forward, because the pattern that results will reflect a consensus, or at least a pooling of judgment, of many different tribunals.

For this consensus or maturing of judgment the district judge proposes to substitute a single trial before a single jury instructed in accordance with no actual law of any jurisdiction--a jury that will receive a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia. One jury, consisting of six persons (the standard federal civil jury nowadays consists of six regular jurors and two alternates), will hold the fate of an industry in the palm of its hand. This jury, jury number fourteen, may disagree with twelve of the previous thirteen juries--and hurl the industry into bankruptcy. That kind of thing can happen in our system of civil justice (it is not likely to happen, because the industry is likely to settle--whether or not it really is liable) without violating anyone's legal rights. But it need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers. That would not be a feasible option if the stakes to each class member were too slight to repay the cost of suit, even though the aggregate stakes were very large and would repay the costs of a consolidated proceeding. But this is not the case with regard to the HIV-hemophilia litigation. Each plaintiff if successful is apt to receive a judgment in the millions. With the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions, it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11.

We have hinted at the second reason for concern that the district judge exceeded the bounds of permissible judicial discretion. He proposes to have a jury determine the negligence of the defendants under a legal standard that does not actually exist anywhere in the world. One is put in mind of the concept of "general" common law that prevailed in the era of *Swift v. Tyson*. The assumption is that the common law of the 50 states and the District of Columbia, at least so far as bears on a claim

of negligence against drug companies, is basically uniform and can be abstracted in a single instruction. It is no doubt true that at some level of generality the law of negligence is one, not only nationwide but worldwide. Negligence is a failure to take due care, and due care a function of the probability and magnitude of an accident and the costs of avoiding it. A jury can be asked whether the defendants took due care. And in many cases such differences as there are among the tort rules of the different states would not affect the outcome. The Second Circuit was willing to assume *dubitante* that this was true of the issues certified for class determination in the Agent Orange litigation. *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 861 (2d Cir.1984).

We doubt that it is true in general, and we greatly doubt that it is true in a case such as this in which one of the theories pressed by the plaintiffs, the "serendipity" theory, is novel. If one instruction on negligence will serve to instruct the jury on the legal standard of every state of the United States applicable to a novel claim, implying that the claim despite its controversiality would be decided identically in all 50 states and the District of Columbia, one wonders what the Supreme Court thought it was doing in the *Erie* case when it held that it was *unconstitutional* for federal courts in diversity cases to apply general common law rather than the common law of the state whose law would apply if the case were being tried in state rather than federal court. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-80, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938). The law of negligence, including subsidiary concepts such as duty of care, foreseeability, and proximate cause, may as the plaintiffs have argued forcefully to us differ among the states only in nuance, though we think not, for a reason discussed later. But nuance can be important, and its significance is suggested by a comparison of differing state pattern instructions on negligence and differing judicial formulations of the meaning of negligence and the subordinate concepts. See, e.g., *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1556-57 (7th Cir.1987); *Olson v.*

*Prosoco, Inc.*, 522 N.W.2d 284, 286-90 (Ia.1994); *Arkansas Kraft v. Cottrell*, 313 Ark. 465, 855 S.W.2d 333, 337 (1993); *Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1158-59 (Miss.1992); *Knight v. Jewett*, 3 Cal. 4th 296, 11 Cal.Rptr.2d 2, 834 P.2d 696 (1992); *Doe v. Grosvenor Properties (Hawaii) Ltd.*, 73 Haw. 158, 829 P.2d 512 (1992); *Riddle v. McLouth Steel Products Corp.*, 440 Mich. 85, 485 N.W.2d 676 (1992); *Kinsey v. Bray*, 596 N.E.2d 938, 940 (Ind.App.1992); *Preston v. Keith*, 217 Conn. 12, 584 A.2d 439 (1991); *Kalata v. Anheuser-Busch Cos.*, 144 Ill.2d 425, 163 Ill.Dec. 502, 581 N.E.2d 656 (1991); *Tappe v. Iowa Methodist Medical Center*, 477 N.W.2d 396 (Ia.1991); *Rollins v. Peterson*, 813 P.2d 1156 (Utah 1991); *Walton v. Potlatch Corp.*, 116 Idaho 892, 781 P.2d 229 (1989); *Toy v. District of Columbia*, 549 A.2d 1 (D.C.App.1988); *Wickwire v. Arctic Circle Air Services*, 722 P.2d 930 (Alaska 1986); *Streich v. Hilton-Davis*, 214 Mont. 44, 692 P.2d 440, 449 (1984); *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 432 A.2d 925 (1981); *Marlow v. City of Columbia Heights*, 284 N.W.2d 389 (Minn.1979); *Petition of Kinsman Transit Co.*, 338 F.2d 708, 721- 26 (2d Cir.1964). "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222, 37 S.Ct. 524, 531, 61 L.Ed. 1086 (1917) (Holmes, J., dissenting). The voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch.

The "serendipity" theory advanced by the plaintiffs in *Wadleigh* is that if the defendants did not do enough to protect hemophiliacs from the risk of Hepatitis B, they are liable to hemophiliacs for any consequences--including infection by the more dangerous and at the time completely unknown AIDS virus-- that proper measures against Hepatitis B would, all unexpectedly, have averted. This theory of liability, which draws support from Judge Friendly's opinion in *Petition of Kinsman Transit Co., supra*, 338 F.2d at 725, dispenses, rightly or wrongly from the standpoint of the Platonic Form of

negligence, with proof of foreseeability, even though a number of states, in formulating their tests for negligence, incorporate the foreseeability of the risk into the test. See, e.g., *Fawley v. Martin's Supermarkets, Inc.*, 618 N.E.2d 10, 13 (Ind.App.1993); Comment Note, "Foreseeability as an Element of Negligence and Proximate Cause," 100 A.L.R.2d 942 (1994). These states follow Judge Cardozo's famous opinion in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928), under which the HIV plaintiffs might (we do not say would--we express no view on the substantive issues in this litigation) be barred from recovery on the ground that they were unforeseeable victims of the alleged failure of the defendants to take adequate precautions against infecting hemophiliacs with Hepatitis B and that therefore the drug companies had not violated any duty of care to them.

The plaintiffs' second theory focuses on the questions when the defendants should have learned about the danger of HIV in the blood supply and when, having learned about it, they should have taken steps to eliminate the danger or at least warn hemophiliacs or their physicians of it. These questions also may be sensitive to the precise way in which a state formulates its standard of negligence. If not, one begins to wonder why this country bothers with different state legal systems.

Both theories, incidentally, may be affected by differing state views on the role of industry practice or custom in determining the existence of negligence. In some states, the standard of care for a physician, hospital, or other provider of medical services, including blood banks, is a professional standard, that is, the standard fixed by the relevant profession. In others, it is the standard of ordinary care, which may, depending on judge or jury, exceed the professional standard. Joseph Kelly, "The Liability of Blood Banks and Manufacturers of Clotting Products to Recipients of HIV-Infected Blood: A Comparison of the Law and Reaction in the United States, Canada, Great Britain, Ireland, and Australia," 27 *John Marshall Law Review* 465, 472-74 (1994); *United Blood Services v.*

*Quintana*, 827 P.2d 509, 525-26 (Colo.1992). Which approach a state follows, and whether in those states that follow the professional-standard approach manufacturers of blood solids would be assimilated to blood banks as providers of medical services entitled to shelter under the professional standard, could make a big difference in the liability of these manufacturers. We note that persons infected by HIV through blood transfusions appear to have had little better luck suing blood banks than HIV-positive hemophiliacs have had suing the manufacturers of blood solids. Kelly, *supra*, at 465-77.

The diversity jurisdiction of the federal courts is, after *Erie*, designed merely to provide an alternative forum for the litigation of state-law claims, not an alternative system of substantive law for diversity cases. But under the district judge's plan the thousands of members of the plaintiff class will have their rights determined, and the four defendant manufacturers will have their duties determined, under a law that is merely an amalgam, an averaging, of the nonidentical negligence laws of 51 jurisdictions. No one doubts that Congress could constitutionally prescribe a uniform standard of liability for manufacturers of blood solids. It might we suppose promulgate pertinent provisions of the *Restatement (Second) of Torts*. The point of *Erie* is that Article III of the Constitution does not empower the federal courts to create such a regime for diversity cases.

If in the course of individual litigations by HIV-positive hemophiliacs juries render special verdicts that contain findings which do not depend on the differing state standards of negligence--for example a finding concerning the date at which one or more of the defendants learned of the danger of HIV contamination of the blood supply--these findings may be given collateral estoppel effect in other lawsuits, at least in states that allow "offensive" use of collateral estoppel. In that way the essential purpose of the class action crafted by Judge Grady will be accomplished. If there are relevant differences in state law, findings in one suit will not be given collateral estoppel effect in

others, *Commissioner v. Sunnen*, 333 U.S. 591, 599-600, 68 S.Ct. 715, 720-21, 92 L.Ed. 898 (1948); *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 2 OBR 732, 443 N.E.2d 978, 987-88 (1983)-- and that is as it should be.

The plaintiffs argue that an equally important purpose of the class certification is to overcome the shyness or shame that many people feel at acknowledging that they have AIDS or are HIV-positive even when the source of infection is not a stigmatized act. That, the plaintiffs tell us, is why so few HIV-positive hemophiliacs have sued. We do not see how a class action limited to a handful of supposedly common issues can alleviate *that* problem. Any class member who wants a share in any judgment for damages or in any settlement will have to step forward at some point and identify himself as having AIDS or being HIV-positive. He will have to offer jury findings as collateral estoppel, overcome the defendants' defenses to liability (including possible efforts to show that the class member became infected with HIV through a source other than the defendants' product), and establish his damages. If the privacy of these class members in these follow-on proceedings to the class action is sought to be protected by denominating them "John Does," that is something that can equally well be done in individual lawsuits. The "John Doe" device--and with it the issue of privacy--is independent of class certification.

The third respect in which we believe that the district judge has exceeded his authority concerns the point at which his plan of action proposes to divide the trial of the issues that he has certified for class-action treatment from the other issues involved in the thousands of actual and potential claims of the representatives and members of the class. Bifurcation and even finer divisions of lawsuits into separate trials are authorized in federal district courts. Fed.R.Civ.P. 42(b); *Sellers v. Baisier*, 792 F.2d 690, 694 (7th Cir.1986). And a decision to employ the procedure is reviewed deferentially. *Berry v. Deloney*, 28 F.3d 604, 610 (7th Cir.1994); *De Witt, Porter, Huggett, Schumacher & Morgan, S.C. v. Kovalic*, 991 F.2d 1243, 1245 (7th Cir.1993);

*Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 105 (3d Cir.1992). However, as we have been at pains to stress recently, the district judge must carve at the joint. *Hydrite Chemicals Co. v. Calumet Lubricants Co.*, 47 F.3d 887, 890-91 (7th Cir.1995); cf. *McLaughlin v. State Farm Mutual Automobile Ins. Co.*, 30 F.3d 861, 870-71 (7th Cir.1994). Of particular relevance here, the judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries. The problem is not inherent in bifurcation. It does not arise when the same jury is to try the successive phases of the litigation. But most of the separate "cases" that compose this class action will be tried, after the initial trial in the Northern District of Illinois, in different courts, scattered throughout the country. The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact. This would be obvious if the second finder of fact were a judge. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537-38, 78 S.Ct. 893, 900-01, 2 L.Ed.2d 953 (1958); *Davenport v. DeRobertis*, 844 F.2d 1310, 1313-14 (7th Cir.1988); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir.1986). But it is equally true if it is another jury. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931); *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir.1993); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir.1978). In this limited sense, a jury verdict can have collateral estoppel effect. *Davenport v. DeRobertis, supra*, 844 F.2d at 1313-14; *Hudson Ins. Co. v. City of Chicago Heights*, 48 F.3d 234, 237-38 (7th Cir.1995).

The plan of the district judge in this case is inconsistent with the principle that the findings of one jury are not to be reexamined by a second, or third, or *n*th jury. The first jury will not determine liability. It will determine merely whether one or more of the defendants was negligent under one of the two

theories. The first jury may go on to decide the additional issues with regard to the named plaintiffs. But it will not decide them with regard to the other class members. Unless the defendants settle, a second (and third, and fourth, and hundredth, and conceivably thousandth) jury will have to decide, in individual follow-on litigation by class members not named as plaintiffs in the *Wadleigh* case, such issues as comparative negligence--did any class members knowingly continue to use unsafe blood solids after they learned or should have learned of the risk of contamination with HIV?--and proximate causation. Both issues overlap the issue of the defendants' negligence. Comparative negligence entails, as the name implies, a comparison of the degree of negligence of plaintiff and defendant. See, e.g., Alaska Stat. § 09.17.080; ILCS 735 5/2-1116; N.J.Stat. § 2A:15-5.1; Ohio Rev.Code § 2315.19; Utah Code § 78-27-38. Proximate causation is found by determining whether the harm to the plaintiff followed in some sense naturally, uninterruptedly, and with reasonable probability from the negligent act of the defendant. It overlaps the issue of the defendants' negligence even when the state's law does not (as many states do) make the foreseeability of the risk to which the defendant subjected the plaintiff an explicit ingredient of negligence. See, e.g., *Powell v. Drumheller*, --- Pa. ----, 653 A.2d 619 (1995); *Whittaker v. Saraceno*, 418 Mass. 196, 635 N.E.2d 1185 (1994); *Vincent v. Fairbanks Memorial Hospital*, 862 P.2d 847, 851-52 (Alaska 1993); *Flight Line, Inc. v. Tanksley, supra*, 608 So.2d at 1158-59; *Wasfi v. Chaddha*, 218 Conn. 200, 588 A.2d 204 (1991). A second or subsequent jury might find that the defendants' failure to take precautions against infection with Hepatitis B could not be thought the *proximate* cause of the plaintiffs' infection with HIV, a different and unknown blood-borne virus. How the resulting inconsistency between juries could be prevented escapes us.

The protection of the right conferred by the Seventh Amendment to trial by jury in federal civil cases is a traditional office of the writ of mandamus. *Beacon Theatres v. Westover*,

359 U.S. 500, 510-11, 79 S.Ct. 948, 956-57, 3 L.Ed.2d 988 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962); *Maloney v. Plunkett, supra*; *First National Bank v. Warren*, 796 F.2d 999 (7th Cir.1986). When the writ is used for that purpose, strict compliance with the stringent conditions on the availability of the writ (including the requirement of proving irreparable harm) is excused. In *Beacon*, for example, if the judge had gone ahead and tried the equitable claims first and made his decision collateral estoppel in the subsequent jury trial, the losing party would have been entitled to a new trial, wiping out the judge's decision. There was no irreparable harm, yet mandamus was granted--which is one reason why in cases like *Maloney* and *Sandahl* we have said that the use of the writ cannot be reduced to formula. But the looming infringement of Seventh Amendment rights is only one of our grounds for believing this to be a case in which the issuance of a writ of mandamus is warranted. The others as we have said are the undue and unnecessary risk of a monumental industry-busting error in entrusting the determination of potential multi-billion dollar liabilities to a single jury when the results of the previous cases indicate that the defendants' liability is doubtful at best and the questionable constitutionality of trying a diversity case under a legal standard in force in no state. We need not consider whether any of these grounds standing by itself would warrant mandamus in this case. Together they make a compelling case.

We know that an approach similar to that proposed by Judge Grady has been approved for asbestos litigation. See in particular *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir.1986); *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.1986). Most federal courts, however, refuse to permit the use of the class-action device in mass-tort cases, even asbestos cases. Thomas E. Willging, *Trends in Asbestos Litigation* 93-98 (Federal Judicial Center 1987); cf. *In re Fibreboard Corp., supra*; *In re Joint Eastern & Southern District Asbestos Litigation*, 982 F.2d 721 (2d Cir.1992). Those courts that have

permitted it have been criticized, and alternatives have been suggested which recognize that a sample of trials makes more sense than entrusting the fate of an industry to a single jury. See, e.g., Michael J. Saks & Peter David Blanck, "Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts," 44 *Stan.L.Rev.* 815 (1992). The number of asbestos cases was so great as to exert a well-nigh irresistible pressure to bend the normal rules. No comparable pressure is exerted by the HIV-hemophilia litigation. That litigation can be handled in the normal way without undue inconvenience to the parties or to the state or federal courts.

The defendants have pointed out other serious problems with the district judge's plan, but it is unnecessary to discuss them. The petition for a writ of mandamus is granted, and the district judge is directed to decertify the plaintiff class.

ILANA DIAMOND ROVNER, *Circuit Judge*, dissenting.

The majority today takes the extraordinary step of granting defendants' petition for a writ of mandamus and directing the district court to rescind its order certifying the plaintiff class. Although certification orders like this one are not immediately appealable (*see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)), the majority seizes upon our mandamus powers to effectively circumvent that rule. Because, in my view, our consideration of Judge Grady's decision to certify an issue class under Fed.R.Civ.P. 23(c)(4) should await an appeal from the final judgment in *Wadleigh*, I would deny the writ.

The Supreme Court has consistently cautioned that mandamus is a drastic remedy to be employed only in the most extraordinary of cases. *See, e.g., Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289, 108 S.Ct. 1133, 1143-44, 99 L.Ed.2d 296 (1988); *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S.Ct. 188, 189-90, 66 L.Ed.2d 193 (1980) (per curiam); *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 402, 96 S.Ct.

2119, 2123-24, 48 L.Ed.2d 725 (1976). The writ traditionally has been used only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction" [illegible] is justified only by "exceptional circumstances amounting to a judicial 'usurpation of power.' " *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305 (1967); *see also Gulfstream Aerospace Corp.*, 485 U.S. at 289, 108 S.Ct. at 1143-44; *Allied Chemical*, 449 U.S. at 35, 101 S.Ct. at 190; *Kerr*, 426 U.S. at 402, 96 S.Ct. at 2123-24. "To ensure that mandamus remains an extraordinary remedy," the Supreme Court requires the proponents of a writ to "show that they lack adequate alternative means to obtain the relief they seek," and that their right to relief is "clear and indisputable." *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 309, 109 S.Ct. 1814, 1822, 104 L.Ed.2d 318 (1989); *see also Allied Chemical*, 449 U.S. at 35, 101 S.Ct. at 190 (party seeking issuance of writ must "have no other adequate means to attain the relief he desires"); *Kerr*, 426 U.S. at 403, 96 S.Ct. at 2123-24; *Eisenberg v. United States District Court for the Southern District of Illinois*, 910 F.2d 374, 375 (7th Cir.1990) (petitioner must show "that immediate correction is necessary-- without it the petitioner will suffer serious and irreparable injury.").

Even when a petitioner's right to relief is sufficiently clear, a writ should not issue if an adequate alternative is available. See *Maloney v. Plunkett*, 854 F.2d 152, 154 (7th Cir.1988); *In re American Airlines, Inc.*, 972 F.2d 605, 608 (5th Cir.1992) ("unless [petitioner] demonstrates that it lacks an adequate alternative means to obtain relief, we need not consider whether its right to a writ of mandamus is 'clear and indisputable.' "), cert. denied, — U.S. —, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993). We observed in *Maloney*, for example, that clear error is a necessary but not sufficient condition for the issuance of the writ: "Not only must the error be clear; it must be irremediable by the regular appellate remedies." 854 F.2d at 154; cf. *Will*, 389 U.S. at 104, 88 S.Ct. at 278 ("Mandamus, it must be remembered, does not run the gauntlet of reversible errors."

(internal quotation omitted)). And when review of the challenged order is available by direct appeal after entry of a final judgment, "it cannot be said that the litigant 'has no other adequate means to seek the relief he desires.'" *Allied Chemical Corp.*, 449 U.S. at 36, 101 S.Ct. at 191; *see also In re City of Springfield, Illinois*, 818 F.2d 565, 568 (7th Cir.1987); *J.H. Cohn & Co. v. American Appraisal Assoc., Inc.*, 628 F.2d 994, 999 (7th Cir.1980); *Campanioni v. Barr*, 962 F.2d 461, 464 (5th Cir.1992).

The majority concedes that this court would have an opportunity to review the certification order on appeal from a final judgment addressed to the named plaintiffs in *Wadleigh*. (*Ante* at 1297.) Yet the majority finds this avenue inadequate because "it will come too late to provide effective relief to the defendants." (*Id.*) This is so because class treatment of plaintiffs' claims will pose a liability risk of such magnitude that defendants "will be under intense pressure to settle." (*Id.* at 1298.) And if that risk produces the predicted settlement, the district court's certification order would evade this court's review. (*Id.*) Because of the likelihood of a settlement, then, the majority believes that the first condition for issuance of a writ of mandamus has been satisfied, and it proceeds to consider whether the district court's discretionary decision to certify a class amounts to a "judicial usurpation of power." (*Id.* at 1304.)

I find the majority's reasoning troubling in several respects. First, it means that the preliminary requirement for mandamus--the lack of an alternative means of obtaining relief--will be satisfied by virtually every class certification order, which then authorizes the court to assess the relative merits of the order to determine whether it is "usurpative." The majority's complaint about Judge Grady's order--that it will make a settlement more likely than if defendants' negligence were to be determined by separate juries in individual trials--is true of most every order certifying a large plaintiff class. Certification orders almost always increase the likelihood of settlement by expanding the scope of defendants' exposure. Yet that does not

make the order any less reviewable if defendants resist the temptation to settle and litigate to final judgment. See *In re Sugar Antitrust Litigation*, 559 F.2d 481, 483 n. 1 (9th Cir.1977). Indeed, in concluding that certification orders are not immediately appealable under 28 U.S.C. § 1291, the Supreme Court observed that any order certifying a large plaintiff class "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476, 98 S.Ct. at 2462. Yet that did not stop the Court from finding that "orders granting class certification are interlocutory" and thus not immediately appealable as of right. *Id.* But the majority here would override *Coopers'* edict, making certification orders reviewable on mandamus simply because the likelihood of a settlement makes the order unreviewable at the end of the case. I cannot reconcile this conclusion with *Coopers & Lybrand* or with the Supreme Court's mandamus cases. *See In re Catawba Indian Tribe of South Carolina*, 973 F.2d 1133, 1137 (4th Cir.1992) (court reluctant to permit mandamus to accomplish "what *Coopers & Lybrand* so clearly prohibits by way of interlocutory appeal not certified under 28 U.S.C. § 1292(b)."); *DeMasi v. Weiss*, 669 F.2d 114, 118-19 (3d Cir.1982) (refusing to employ mandamus to circumvent *Coopers & Lybrand*); *see also In re School Asbestos Litigation*, 921 F.2d 1338, 1342 (3d Cir.1990) ("[T]his court adheres to its decision in DeMasi and does not intend to dilute our clear holding that precludes the use of mandamus to reverse the grant or denial of a class certification.").[1] I thus cannot agree that the possibility

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[1] The majority relies on *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir.1990), to support its writ here, contending that the Fifth Circuit, like "[m]ost federal courts, ... refuse[s] to permit the use of the class- action device in mass-tort cases." (*Ante* at 1304; *see also* at 1295.) In *Fibreboard*, however, the court objected to a procedure whereby the claims of nearly 3,000 plaintiffs would be resolved in a "sample" trial of only forty-one representative class members. 893 F.2d at 711. On the basis of the evidence addressed to the sample, the jury would determine actual damages due the entire class, rather than the amount due each plaintiff. *Id.* at 709. The court issued a writ of

of a settlement satisfies defendants' burden under the first of the two requirements for mandamus.

I also am wary of the majority's application of a "settlement theory" in this case, as defendants did not offer that rationale in support of their petition. Their failure to do so is important because the Supreme Court has required the party seeking mandamus to bear the burden of establishing that it lacks an alternative means of obtaining relief. See, e.g., *Mallard*, 490 U.S. at 309, 109 S.Ct. at 1822; *In re Catawba Indian Tribe*, 973 F.2d at 1136; *In re Recticel Foam Corp.*, 859 F.2d 1000, 1006 (1st Cir.1988). Nowhere in their petition or in their briefs to this court did defendants suggest that Judge Grady's order would prompt them to settle. Instead, defendants argued that irreparable harm would result from the class trial itself, as well as from the satellite litigation it would spawn.[2] The possibility

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mandamus because this procedure would violate Texas law. Id. at 711-12. But contrary to the majority's assertions here, the Fifth Circuit did not refuse to permit any class treatment of the plaintiffs' claims, nor did it discourage use of the class action device in mass torts. Instead, the court expressly *authorized* a class trial addressed, inter alia, to whether the defendants had acted negligently. *Id.* at 708 (describing Phase I trial) at 712 (authorizing Phase I trial); *see also Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir.1986) (affirming class certification ruling in earlier phase of same litigation). The Phase I trial authorized in *Fibreboard* is similar to that envisioned by Judge Grady here, and the Phase II trial to which the *Fibreboard* court objected bears no resemblance to the individual Phase II trials that would follow the class negligence trial under Judge Grady's plan. Moreover, to the extent that *Fibreboard* may support the issuance of a writ even where a direct appeal is later available, that decision fails to explain why the opportunity for a later appeal would not provide an adequate alternative means of obtaining relief. Perhaps the court was concerned, however, that a direct appeal could only follow a class-wide judgment, whereas here, the class issues would be reviewable on direct appeal from a judgment addressed only to the named plaintiffs.

[2] Specifically, defendants argued that Judge Grady's certification order did not envision entry of a final judgment (a position the majority has appropriately rejected), that a class trial would spawn additional litigation in jurisdictions throughout the country over the effect of the class verdict, and that the class trial would delay discovery in other cases, perhaps preventing defendants from deposing plaintiffs whose health continues to deteriorate.

of a settlement was raised for the first time by the court itself at oral argument. Generally, arguments not raised in a party's brief, but only at oral argument, are waived. *See, e.g., United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir.1989). But even assuming that we may consider the argument (*see ante* at 1298-99), I fail to see how counsel's vague statements at oral argument about the possibility of a settlement can be said to satisfy defendants' substantial burden of establishing that they will suffer irreparable harm. The only "evidence" supporting counsel's assertion has been supplied by the majority's own statistical conjecturing, to which plaintiffs have had no opportunity to respond. Cf. *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1268 (7th Cir.1995) (refusing to consider argument raised for the first time in a post-judgment motion because the opposing party had no opportunity to test the assumptions underlying the argument). The burden of proving irreparable harm lies with the party seeking mandamus relief, not with the court, and defendants wholly failed to meet that burden here.

Furthermore, even if the possibility of a settlement were relevant to the first mandamus requirement, and even if it had been asserted by defendants in support of their petition, I still cannot agree with the majority's premise that Judge Grady's order in fact will prompt a settlement. Contrary to the clear implication of the majority's opinion (*ante* at 1298), the class portion of the anticipated trial in this case would not go so far as to establish defendants' *liability* to a class of plaintiffs; it would instead resolve *only* the question of whether defendants were negligent in distributing tainted clotting factor at any particular point in time. Even if defendants were faced with an adverse class verdict, then, a plaintiff still would be required to clear a number of hurdles before he would be entitled to a judgment. For example, defendants no doubt would contest at that stage whether a particular plaintiff could establish proximate causation

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(Pet. for a Writ of Mandamus at 45-48.)

or whether his or her claim is in any event barred by the statute of limitations. Thus, contrary to the majority's implication, a class verdict in favor of plaintiffs would not automatically entitle each member of the class to a seven-figure judgment. (*See ante* at 1300.) The defendants will thus have ample opportunity to settle should they lose the class trial. And that would seem to me an advisable strategy in light of the success they have had in earlier cases. That factor distinguishes this case from a more standard class action, where a non-bifurcated trial would resolve all relevant issues and conclusively establish liability to the class. Perhaps that explains why defendants' own arguments in support of their petition are based on the assumption that a class trial would ensue, rather than on the proposition that a settlement would follow inevitably from Judge Grady's order.[3]

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[3] As an alternative to its settlement theory, the majority suggests that the irreparable harm requirement is relaxed in this case because the certification order infringes defendants' Seventh Amendment right to a jury trial. (*Ante* at 1295, 1303-04.) But the circumstances here are unlike those in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), which the majority cites to support its position. In those cases, mandamus issued after the district court had decided to try equitable claims to the court before trying related legal claims to a jury. Because the court's findings on the equitable claims would have effectively denied defendants their right to jury resolution of issues common to their legal claims, the Supreme Court granted mandamus to protect defendants' right to a jury trial. *Beacon Theatres*, 359 U.S. at 510-11, 79 S.Ct. at 956-57; *Dairy Queen*, 369 U.S. at 472-73, 82 S.Ct. at 897; *see also Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665 n. 7, 98 S.Ct. 2552, 2559 n. 7, 57 L.Ed.2d 504 (1978). The Court believed that there was no need to await an appeal from a final judgment in that circumstance to remedy an obvious violation of the Seventh Amendment. *See First Nat'l Bank of Waukesha v. Warren*, 796 F.2d 999, 1004 (7th Cir.1986). Here, by contrast, the district court's certification order does not present such an obvious Seventh Amendment problem, as it will not deprive defendants of their right to have a jury resolve any issue. Instead, the Seventh Amendment violation the majority envisions might appear, if at all, only in a phase II trial. It is thus a possible but by no means imminent consequence of the certification order. And if any constitutional problem were to materialize, it would be reviewable either by this court after the class trial or by other courts reviewing phase II trials. In either event, the reviewing court would then have a record to examine, rather than speculating about a

Finally, although the availability of review on direct appeal after final judgment makes it unnecessary for me to discuss the merits of the certification order, the majority's arguments addressed to the propriety of forcing "defendants to stake their companies on the outcome of a single jury trial" or of allowing a single jury to "hold the fate of an industry in the palm of its hand" seem to me at odds with Fed.R.Civ.P. 23 itself. (See ante at 1299, 1300, 1304.) That rule expressly permits class treatment of such claims when its requirements are met, regardless of the magnitude of potential liability. And I see nothing in Rule 23, or in any of the relevant cases, that would make likelihood of success on the merits a prerequisite for class certification. (Cf. ante at 1299, 1304.) The majority's preference for avoiding a class trial and for submitting the negligence issue "to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers" (ante at 1300) is a rationale for amending the rule, not for avoiding its application in a specific case. Cf. *Coopers & Lybrand*, 437 U.S. at 470, 98 S.Ct. at 2458-59 (policy arguments addressed to the benefits and burdens of class litigation are matters only for legislative consideration).

I must concede that I too have doubts about whether the class trial proposed by Judge Grady will succeed, and I sympathize with many of the apprehensions of my brothers. But in my view, the law requires that Judge Grady's plan be given the opportunity to succeed. Class certification orders are, after all, conditional orders subject to modification or revocation as the circumstances warrant. Fed.R.Civ.P. 23(c)(1); *Coopers & Lybrand*, 437 U.S. at 469, 98 S.Ct. at 2458; *DeMasi*, 669 F.2d at 118; *General Motors Corp. v. City of New York*, 501 F.2d

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potential constitutional violation, as the majority does here. *See In re Diamond Shamrock Chem. Co.*, 725 F.2d 858, 862 (2d Cir.) (denying mandamus because "[r]eview of the many issues raised by the class certification will be available [on direct appeal] when the ramifications of each aspect of the ruling will be evident."), cert. denied, 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984). I thus cannot agree that the mere possibility of a constitutional violation somehow eliminates the first mandamus requirement.

639, 647 (2d Cir.1974). If the problems envisioned by the majority were to materialize at a class trial, Judge Grady could always modify his earlier ruling or even abandon it altogether, and his response in that regard would be reviewable by this court on direct appeal, once the actual ramifications of the certification order were evident. *See In re Diamond Shamrock Chem. Co.*, 725 F.2d 858, 862 (2d Cir.), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984).

In the final analysis, I think it significant that the majority recognizes the need for limits on the mandamus power--"if uncabined," that power has the potential "to unravel the final-decision rule" of 28 U.S.C. § 1291. (Ante at 1294.) The way to cabin that power, the majority explains, is "[b]y taking seriously the two conditions for the grant of a writ of mandamus." (*Id.*) Yet in holding that the possibility of a settlement satisfies the first condition, the majority, regrettably, has failed to heed its own counsel. I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| IN RE: | ) | MDL-986 |
| | ) | |
| FACTOR VIII OR IX | ) | No. 93 C 7452 |
| CONCENTRATE | ) | |
| BLOOD PRODUCTS | ) | THIS DOCUMENT |
| LITIGATION | ) | RELATES TO: |
| | ) | |
| | ) | JONATHAN WADLEIGH, |
| | ) | et al. v. RHONE- |
| | ) | POULENC RORER, INC., |
| | ) | et al., No. 93 C 5969 |

**PRETRIAL ORDER NO. 5**
**CLASS CERTIFICATION ORDER**

For the reasons set forth in the Memorandum Opinion entered by this court on August 17, 1994, and after consideration of plaintiffs' motion for class certification and the memoranda in support and in opposition, the court finds:

1. Pursuant to Rule 23(a) of the Federal Rules of Civil Procedure:

(a) The class is so numerous that joinder of all members is impracticable;

( ) There are questions of law and fact common to the class;

(c) The claims of the representative plaintiffs are typical of the claims of the class; and

(d) The representative plaintiffs will fairly and adequately protect the interests of the class.

2. Pursuant to Rule 23(c)(4)(A) of the Federal Rules of Civil Procedure, the court finds that the negligence issues against all defendants and the breach of fiduciary duty issues against defendant National Hemophilia Foundation ("NHF") are appropriate for classwide determination.

3. Pursuant to Rule 23(b)(3), with respect to such claims the court finds:

(a) Questions of law and fact common to the members of the class predominate over any questions which may affect only individual members; and

(b) A class action is superior to any other available methods for the fair and efficient adjudication of this controversy.

4. The court finds that there may be valid reasons why certain class members would elect not to assert claims against the NHF while still desiring to assert claims against the fractionator defendants. This raises the possibility of class members opting out solely to avoid asserting claims against the NHF. This consideration is sufficient to justify the creation of an opt-out procedure for class members as to the NHF only, while allowing for their continued class membership in the litigation against the fractionator defendants.

Accordingly, it is hereby ORDERED THAT:

1. Class certification is *granted* under Federal Rule of Civil Procedure 23(c)(4)(A) as to the negligence issues against all defendants and the breach of fiduciary duty issues against defendant National Hemophilia Foundation.

2. The following class is hereby certified:

(a) Except as stated in (c), below, all persons who are, or deceased persons who were, (1) citizens or permanent residents of the United States, and are (2) persons with hemophilia, and were (3) users of

Factor VIII or Factor IX manufactured by Alpha, Armour, Baxter or Miles and supplied by them in the United States, and are (or deceased persons who were) (4) infected with HIV allegedly as a result of use of such Factor VIII or Factor IX; and

(b) Except as stated in (c), below, parents, spouses, children, guardians, and legal representatives of such persons, with direct or derivative claims.

(c) A person who has previously made a claim against one or more defendants where that claim has resulted in a final judgment or settlement shall not be a member of the class as to such defendant(s).

3. Plaintiffs in the amended complaint, Civil Action No. 93 C 5969, are hereby designated to serve as class representatives.

4. The members of plaintiffs' Steering Committee in *In Re Factor VIII or IX Concentrate Blood Products Litigation,* MDL-986, are appointed to serve as class counsel.

5. Plaintiffs' motion for class certification is denied in all other respects.

DATED: November 3, 1994

ENTER: _____

John F. Grady, United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| JONATHAN WADLEIGH, et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. 93 C 5969 |
| RHONE-POULENC RORER, INC., INC., ARMOUR PHARMA-CEUTICAL COMPANY, INC., MILES, INC., BAXTER HEALTHCARE CORPORATION, ALPHA THERAPEUTIC CORPORATION, and NATIONAL HEMOPHILIA FOUNDATION, | ) | |
| Defendants. | ) | |

## MEMORANDUM OPINION

GRADY, District Judge.

This opinion addresses plaintiffs' motion for class certification. The named plaintiffs in this diversity case are persons suffering from hemophilia and the spouses, guardians and personal representatives of persons who suffer or have suffered from the disease. Hemophilia is a hereditary bleeding disorder in males caused by an insufficiency of certain proteins in the blood which are necessary for coagulation to occur. These proteins are referred to as "Factor VIII" and "Factor IX." According to the complaint, some 20,000 persons in the United States have hemophilia. The primary risk of the disease is bleeding,

spontaneously or as a result of trauma, into joints, muscles, or body cavities.

At one time, hemophiliacs were treated by transfusions of plasma or whole blood. This required hospitalization and was largely ineffective because plasma and whole blood contain low levels of Factor VIII and IX. More effective methods were sought, and, by the late 1960s, it had become possible to extract Factor VIII and Factor IX from the blood of donors, concentrate it, and infuse the hemophiliac with the concentrate, known as antihemophilic factor concentrate ("AHF").[1] The concentrate was far more effective in bringing about clotting and it was more convenient as well, inasmuch as no hospitalization was required and the patient could self-inject.

Four of the defendants in this case are manufacturers who extract Factors VIII and IX from donated blood, process it into AHF and distribute the AHF for use by persons with hemophilia. The manufacturing process is known as "fractionating," and these defendants are referred to as "fractionators." The remaining defendant in the case is the National Hemophilia Foundation ("Foundation"), a not-for-profit association organized to advance the interests of the hemophilia community.

The basis of the suit is plaintiffs' claim that as a result of using the defendant fractionators' concentrates they (or their spouses, wards, or decedents) became infected with the Human Immunodeficiency Virus ("HIV") virus. This is the virus that causes Acquired Immune Deficiency Syndrome ("AIDS"), a disease that, over time, destroys the body's immune system and ultimately results in death. Some of the plaintiffs allege that they have contracted the virus, some allege that they have developed AIDS, and others allege that their decedents have died from AIDS-related complications.

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[1] Plaintiffs and the defendants disagree as to whether it is accurate to refer to Factor IX concentrate as AHF, but that question is not material to the class certification issues discussed in this opinion.

The core of plaintiffs' negligence claim is that the fractionators knew in the 1970s that viruses which cause various diseases, such as hepatitis, were blood-borne, and therefore the fractionators should have taken precautions to prevent or at least reduce viral contamination of their products. Instead, plaintiffs allege, the fractionators used plasma collected from paid donors, a group they should have known included many persons at high risk for viral infection, such as intravenous drug users. A major allegation of negligence is that the defendants failed to use available technology to sterilize their AHF products despite their knowledge that a large percentage of patients who use the products were being infected with hepatitis and other serious viral diseases.

The complaint goes on to allege that when the condition now known as AIDS was first reported in 1980, the manufacturers should soon thereafter have known that the disease was blood-borne and could be transmitted by their AHF products. Despite this known risk, the defendants continued to use pooled plasma from paid donors, failed to screen the donors to identify and exclude persons likely to be HIV-positive, failed to take steps to sterilize their products, and failed to warn the hemophilia community of the danger of contracting AIDS from the use of their products. Instead, plaintiffs allege, the fractionators gave false assurances of the safety of their products which they knew would be relied upon by hemophilia patients and their treating physicians. Plaintiffs allege that the defendant Foundation, influenced by the financial contributions it received from the fractionators, gave similar unfounded assurances of the safety of the fractionators' products, knowing that the hemophilia patients and their treating physicians would rely on those assurances.

Plaintiffs allege that more than half of the 20,000 persons with hemophilia in the United States have become infected with the HIV virus and that about 2,000 persons with hemophilia had died from AIDS by the time the complaint in this case was filed in September of 1993.

The complaint contains counts charging the fractionators with negligence, strict products liability, breach of implied warranty and

conspiracy and a count charging the defendant Foundation with negligence and breach of fiduciary duty. Compensatory and punitive damages are sought against all defendants.

## DISCUSSION

In seeking class certification, plaintiffs assert they have met all requirements of Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure. In the alternative, plaintiffs argue that particular issues should be certified for class treatment pursuant to Rule 23(c)(4). Defendants contend that none of the Rule 23 requirements are met and oppose any form of certification. What follows is a discussion of the opposing arguments concerning compliance with the various requirements of the rule.

### Numerosity

Rule 23(a)(1) provides that a class action can be maintained only if "the class is so numerous that joinder of all members is impracticable...." As noted above, plaintiffs estimate that there are some 20,000 persons in the United States who have hemophilia and that as many as half of them may be infected with the HIV virus, usually as a result of using one or more of the defendants' concentrates. Plaintiffs argue that it would not be feasible for each of the affected persons to file a separate suit, owing in part to the substantial litigation costs required to prosecute a claim involving complex scientific issues. It is this financial consideration, along with the reluctance of many HIV-infected hemophiliacs to make a public disclosure of their condition, that, according to plaintiffs, accounts for the fact that no more than about 300 cases have been filed nationwide. Defendants respond that there is no financial impediment to filing suit, since cases of this kind are typically handled by lawyers on a contingent fee basis. Moreover, defendants challenge the suggestion that embarrassment is a deterrent to filing suit; the more likely explanation for the relatively low number of filings, according to defendants, is the realization among the hemophiliac community that there is no basis for any claim against the defendants.

On the numerosity question, as well as other issues discussed in this opinion, this court has an advantage that a trial judge ruling on a class certification motion usually does not have. It has the advantage of having presided over a trial involving the same subject matter. The case of *Poole v. Alpha*, No. 86 C 7623 (N.D.Ill.), was tried to a jury in this court in 1993. Stephen Poole was a hemophiliac who became infected with the HIV virus as a result of using Factor VIII concentrate and eventually died of AIDS, leaving a widow and children surviving. Poole's estate sued the same four fractionators named as defendants in this case, alleging that Poole had used each of their concentrates. The claims and defenses were substantially identical to those that appear to be presented in this case. Expert witnesses testified on both sides concerning the questions of negligence and proximate cause. After 5 1/2 weeks of trial, the jury returned a special verdict finding that "none of the defendants was negligent in any of the ways charged by the plaintiff." Judgment was entered for the defendants, and the case is now on appeal to the Seventh Circuit.

The trial of the *Poole* case was enormously expensive for both sides, and it is unlikely in the extreme that every member of the proposed class in this case would be able to fund a separate action of that kind, even with attorneys working on a contingent fee basis. Expert witness fees alone would run into the tens of thousands of dollars. But aside from the matter of expense, the more specific question under Rule 23(a)(1) is whether the class is so numerous that *joinder* of all members is impracticable. And whether the class consists of hundreds of persons, as defendants argue, or thousands, as plaintiffs say, the number is obviously too large to join as plaintiffs in this one action. Although the rule mentions only the number of class members--thus the shorthand "numerosity" for the rule 23(a)(1) requirement--it is clear that the number is to be considered in connection with all of the relevant circumstances bearing upon the practicability of joinder. *See, e.g., Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir.1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981):

> The basic question is practicability of joinder, not number of interested persons per se. Practicability of joinder depends on size of class, ease of identifying its members and determining their addresses, facility of making service on them if joined and their geographic dispersion. (citation omitted)

In this case, the members of the putative class are alleged to be dispersed throughout the fifty states and the District of Columbia. Their identities are for the most part unknown to the named plaintiffs. Some of the class members may be unaware of their HIV infection. To the extent there is merit to plaintiffs' allegations that the defendants have misled the hemophilia community concerning the safety of factor concentrates, class members may be unaware of the alleged connection between concentrates and transmission of HIV. "For purposes of determining class certification, the allegations are taken as true and the merits of the complaint are not examined." *Allen v. Isaac*, 99 F.R.D. 45, 49 (N.D.Ill.1983) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S.Ct. 2140, 2152-53, 40 L.Ed.2d 732 (1974)). It is not, of course, necessary that joinder of all class members be impossible. As the Seventh Circuit has stated, Rule 23 should be construed to permit a class action where the class is " 'so numerous that their voluntarily, unanimously joining in a suit is concededly improbable and impracticable.' " *Hohmann v. Packard Instrument Co.*, 399 F.2d 711, 715 (7th Cir.1968) (quoting *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 88 (7th Cir.1941)). Moreover, the numerosity requirement is met unless it is practicable to join *all* members of the class. Here, with many members of the class not even identified, there is no plausible argument that it is practicable to join all of them at this time. *See Jack v. American Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir.1974) ("[J]oinder of unknown individuals is certainly impracticable. Thus the requirements of Rule 23(a)(1) would appear to be met here."). And nothing in the rule suggests that class certification should await exhaustion of all efforts to identify

every class member; on the contrary, Rule 23(c)(1) requires that the court rule on class certification "[a]s soon as practicable after the commencement of an action brought as a class action...."

Plaintiffs have satisfied the numerosity requirement.

**Common Questions of Law or Fact.**

The next prerequisite for a class action is the requirement of Rule 23(a)(2) that there be "questions of law or fact common to the class...." The fractionator defendants do not argue that there are no common questions of law or fact but make a variety of arguments as to why common questions do not "predominate over any questions affecting only individual members," a requirement of Rule 23(b)(3). The defendant Foundation, however, argues that there are no questions of law or fact that are common both to it and the fractionator defendants. The Foundation contends that the determination of whether it was negligent will be based on facts it knew or reasonably should have known, whereas the facts known to the fractionators may have been different. While this may be true to an extent, it is also true that one of the principal factual questions in the case will be the state of scientific knowledge at various relevant times concerning the likelihood of transmission of virus by the factor concentrates and what could be done to prevent it. Much of that knowledge was disseminated through scientific journals available to all of the defendants. What the defendant Foundation should have known, and when it should have known it, will be determined by what was reasonably inferable from the available data at various points in time. That inquiry will be the same whether the defendant under consideration be a fractionator or the Foundation. According to the complaint, the Foundation was privy to much of the same information available to the fractionators. The jury might reach different conclusions as among the various defendants, but this does not indicate the absence of a common question.

The fiduciary questions pertain only to the Foundation, but proof of a breach of any fiduciary obligation will depend largely on the common question of what was known in the scientific

community at the relevant times. Plaintiffs' argument will be that if the Foundation ignored or misrepresented the danger of infection associated with the concentrates, it violated its obligations to the members of the hemophilia community who relied upon its advice or its failure to warn.

The common question requirement of Rule 23(a)(2) is satisfied.[2]

**Typicality**

The third prerequisite is that "the claims or defenses of the representative parties are typical of the class or defenses of the class...." Rule 23(a)(3). Defendants argue that the claim of each class member is unique in the severity of his hemophilia, the nature of the medical treatment received, the identity and quantity of factor concentrate used, the manner and date of HIV infection, and various other circumstances affecting both liability and damage issues. Therefore, argue the defendants, no class member's claim is "typical" and no class action can be maintained.

The typicality requirement of the rule overlaps other requirements designed to ensure that the class representative will fairly and adequately prosecute the claims of the absent class members. It is thus related to the common question requirement just discussed as well as to the fair representation requirement of Rule 23(a)(4), discussed below. 7 A. Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d § 1764. Fair and adequate representation does not require that the claims of the representative and the absent members be factually identical. That would usually be impossible. The typicality requirement is satisfied if the claims and legal theories of the class representative

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[2] If it were true that the common questions between plaintiffs and the fractionator defendants were different from the common questions between plaintiffs and the Foundation, this would not mean that there should be no class certification. It would simply mean that there are two class actions rather than one, or that there should be a severance for trial purposes. See Rule 42(b), Fed.R.Civ.P.

are the same as those of the absent class members, even though factual distinctions may exist:

> A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.... The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members. Thus, similarity of legal theory may control in the face of differences of fact.

*De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir.1983) (citations omitted). *See also Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir.1993).

The complaint in this case alleges that all members of the class were injured as a result of the defendant fractionators' negligence in the collection of blood plasma from high-risk donors, their failure to use available methods to deactivate virus in their concentrates, and their sale of contaminated product, without warning of the danger, for use by the class members. The defendant Foundation is charged along with the fractionators with negligent failure to warn class members of the danger involved in the use of the fractionators' products. The claims of all class members are the same, and their legal theories are the same.

The typicality requirement of Rule 23(a)(3) is satisfied.

**Adequacy of Representation**

The final prerequisite is the requirement of Rule 23(a)(4) that "the representative parties will fairly and adequately protect the interests of the class." Defendants again point to the factual differences noted in the foregoing discussion of the typicality requirement. Their argument that these differences impair the ability of the named plaintiffs to represent the class is no more persuasive here. Defendants suggest that class representatives who use only Factor VIII would have no interest in making a case in

regard to Factor IX and that plaintiffs who used the concentrate of one fractionator would have no interest in making a case against any other fractionator. The short answer to this, however, is that according to the complaint, there is at least one class representative for each base that needs to be covered.

Finally, defendants suggest that plaintiffs' failure to join additional defendants, such as health-care providers, indicates a lack of zeal to protect the interests of the class. The court is not in a position to second-guess the strategy of plaintiffs in their selection of defendants. Certainly nothing on the face of the complaint indicates an obvious error in that strategy. The court does note that plaintiffs' counsel in this case are experienced in Factor VIII and Factor IX concentrate litigation and in fact have been appointed by this court to the Plaintiffs' Steering Committee in the Multi-District Litigation which has been centralized in this court for consolidated pretrial proceedings. *In Re Factor VIII and Factor IX Concentrate Litigation*, MDL-986.

The court concludes that the named plaintiffs will adequately represent the class.

**Rule 23(b)(3) Considerations**

In addition to fulfilling the prerequisites of Rule 23(a), plaintiffs must satisfy the requirements of Rule 23(b)(3)

> that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The court's finding that there are common questions of law and fact sufficient to meet the requirement of Rule 23(a)(2) is not the same thing as a finding that those questions predominate over those that affect only individual members of the class.

Plaintiffs emphasize that the defendant fractionators have engaged in essentially similar conduct in regard to their collection of plasma and the manufacture and sale of their concentrates. A

major common issue is whether that conduct was negligent in the various respects alleged by plaintiffs. Plaintiffs point out that they have all been injured in essentially the same way, by contracting HIV from the concentrates, and they minimize any problem associated with the proof of proximate cause in the individual case.

Defendants, on the other hand, emphasize that there were differences in their collection and manufacturing procedures, so that a common determination of negligence would be impossible. The court is not persuaded by this argument, because the point, at least as far as ordinary negligence is concerned, is not what particular procedures the defendants used but whether they failed to take precautions that plaintiffs allege would have been taken by reasonably careful fractionators, specifically, the screening of donors and the sterilization of the concentrates. Should a jury determine that the failure to take these measures was negligence, then, regardless of what procedures a particular fractionator did use, it could be found negligent on the same basis as any other fractionator found guilty of the same omissions.

Defendants argue that there can be no common question of negligence because the rights of the individual class members would be determined according to the law of their state of residence (presumably the place where the injury occurred); the negligence law of each of fifty-one jurisdictions would have to be applied by the jury, making a joint trial impossible.

Defendants are accurate in pointing out that the negligence law of the various states is not uniform in regard to the *duty* it imposes upon a defendant in cases of this kind. According to one writer, most jurisdictions would hold a fractionator only to a "professional standard of care," which means that the plaintiff would have to prove that the conduct of the fractionator departed from what other fractionators were doing at the time. Joseph Kelly, *The Liability of Blood Banks and Manufacturers of Clotting Products to Recipients of HIV-Infected Blood: A Comparison of the Law and Reaction in the United States, Canada, Great Britain, Ireland, and Australia.* 27 J. Marshall L.Rev. 465, 472-73 (1994). The "professional standard of care" rule has a curious history,

described in an interesting article by Professor Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 Wis.L.Rev. 1193. The author explains how physicians were originally held to a standard of ordinary care, just like everyone else. They were required to possess the degree of skill that was ordinarily possessed by other physicians and to *exercise* reasonable care in treating patients. Confusion began with the Illinois case of *Ritchey v. West*, 23 Ill. 329 (1860), where the court, giving no indication that it intended to announce a new rule, stated that a physician was required to "possess and *exercise* that degree of skill which is ordinarily possessed by members of the profession," *id.* at 330 (emphasis added), thus conflating the required skill and the required degree of care. Silver, *supra*, at 1222-25. Eventually, most courts, without seeming to realize they were changing the law, began to express the duty in terms of "professional custom" (more often now referred to as "professional standard of care"), which Silver criticizes as senselessly indulgent:

> With professional custom as the standard, the nation's physicians may lawfully adopt and follow practices that are patently negligent and unreasonable under the standard of ordinary care to which all others are held. The medical community is answerable not for want of care but for want of conformity. It is thus recognized that the medical profession has the curious advantage of establishing, on its own, the standard of care to which it is legally obliged.

*Id.* at 1213. Various justifications have been offered for the rule, but they seem unpersuasive. *Id.* at 1214-19. It is not easy to understand what basis there is for extending the benefit of the rule to commercial suppliers of blood products, such as the defendants in this case. A few courts have held fractionators to a duty of ordinary care. Kelly, *supra*, at 474-76. This court, applying what it believed to be Illinois law, instructed the jury in *Poole v. Alpha* that defendants were required to use reasonable care, and that

> [w]hen I use the words "reasonable care," I mean the care that would be used by reasonably careful collectors of blood or plasma and processors of Factor VIII concentrate under circumstances similar to those shown by the evidence at and prior to the time Stephen Poole contracted the HIV virus. The law does not say how reasonably careful collectors of blood or plasma and processors of Factor VIII concentrate would act under those circumstances. That is for you to decide. In determining whether any defendant exercised reasonable care under the circumstances you may consider:
>
> a. the state of medical and scientific knowledge available at and prior to the time Stephen Poole became infected with HIV;
>
> b. the Food and Drug Administration's regulations governing licensing, manufacturing methods, and labeling; and
>
> c. the practices and procedures of collectors of blood or plasma and processors of Factor VIII concentrate at and prior to the time Stephen Poole became infected with HIV.

In this view, the conduct of other fractionators is relevant but not conclusive on the question of negligence. See Silver, *supra,* at 1241; *Darling v. Charleston Community Memorial Hosp.*, 33 Ill.2d 326, 211 N.E.2d 253, 257, 261 (1965).

Defendants assert repeatedly in their briefs that negligence law differs from state to state, but the only difference they specifically identify is the distinction between ordinary negligence and professional standard of care. They give no examples of differing definitions of ordinary negligence. It is this court's impression that the definition of ordinary negligence is substantially identical in all

jurisdictions. In Illinois, for instance, it is defined as "the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence."[3] IPI, Civil, 10.01. This is not materially different from the definition in the Restatement:

> Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.

Restatement (Second) of Torts, § 283 (1977). Counsel for the fractionator defendants in this case were trial counsel in *Poole*, and they have not made any attempt to show that the Illinois definition is materially different from that of any other state. The court presumes their research has been exhaustive and is content for present purposes with the assumption that, as far as ordinary negligence is concerned, no individualized issues are created by the fact that the claims of the various class members arose in a multiplicity of jurisdictions.

Defendants argue with particular vigor that the law concerning foreseeability of injury will differ among the various jurisdictions. Plaintiffs' complaint emphasizes the fractionators' knowledge as early as the 1970s that blood carries virus and that the Hepatitis B virus was in fact transmitted by blood and blood products. It is further alleged that defendants knew that new viruses could appear at any time. Finally, it is alleged that defendants knew that heat

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[3] In the trial of *Poole v. Alpha*, the jury was given the following instruction:

> When I use the word "negligence" in these instructions, I mean the failure to do something which a reasonably careful fractionator would do, or the doing of something which a reasonably careful fractionator would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful fractionator would act under the circumstances. That is for you to decide.

kills viruses. It is plaintiffs' theory that this knowledge imposed upon the fractionators a duty to sterilize their products to protect against transmission of any harmful virus, known or unknown. This allegation is designed to get around the fact that the AIDS virus was not discovered until the early 1980s, by which time a substantial portion of the hemophilia population had already become infected with it. Defendants argue that this effort by plaintiffs to impose a duty on them to protect against unknown hazards would require application of the law of each state. This is simply a variant of defendants' argument that there are differences in the negligence law of the various states. But the defendants have cited no case law from any state pertinent to the question of whether a defendant has a duty to guard against unknown but allegedly foreseeable risks. This court believes the general rule would be that there is such a duty. The question is not whether the particular risk is known, but whether it is of a kind that was foreseeable to the defendant. In the *Poole* trial, the jury was given the following instruction:

> The defendants had no duty to protect against injuries that were not reasonably foreseeable. On the other hand, it is not necessary for plaintiff to prove that the defendants could have foreseen the HIV virus itself. In determining whether any of the defendants were negligent, you should evaluate that defendant's conduct in light of what was reasonably foreseeable at the time of the defendant's claimed acts or omissions.

If, in the time that has elapsed since the *Poole* trial, counsel for the fractionators had found case law from any jurisdiction which conflicts with the sense of that instruction, they would have cited it. In the absence of such case authority, the court is satisfied that every jurisdiction would follow the rule suggested in § 435 of Restatement (Second) of Torts:

Foreseeability of Harm or Manner of Its Occurrence (1) If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have

foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.

> (2) The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.[4]

As far as plaintiffs' negligence claims are concerned, then, there do not appear to be any individual issues, arising out of either the peculiar circumstances of an individual plaintiff or differences in state law, that would predominate over the common issues. The fact that the defendants might be subject to different duties in different jurisdictions --customary or professional standard in some and ordinary care in others --does not create a multiplicity of individual issues. The fact questions as to what was known in the relevant scientific community at various times, and the efficacy of what the fractionators were doing at various times, are common.

Separate problems are presented by the claims based on strict products liability and breach of implied warranty. The defendants have filed motions to dismiss these counts of the complaint on the ground that the "blood shield" statutes and case law of all states protect the manufacturers or distributors of blood products from strict products liability or liability based on breach of implied

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[4] Comment "a" of § 435 explains:

a. The fact that the actor, at the time of his negligent conduct, neither realized nor should have realized that it might cause harm to another of the particular kind or in the particular manner in which the harm has in fact occurred, is not of itself sufficient to prevent him from being liable for the other's harm if his conduct was negligent toward the other and was a substantial factor in bringing about the harm. However, the manner in which the harm occurs may involve the cooperation of other assisting factors so numerous and so important that the actor's negligence cannot be regarded as a substantial factor in bringing about the harm. (*See* § 433, Clause (a).)

warranty.[5] The court has not ruled on these motions, because the class certification motion should be decided first. *Koch v. Stanard*, 962 F.2d 605, 607 (7th Cir.1992). If the motions are granted, that will moot any question as to whether individual issues predominate in these claims. But even if the motions are denied, the court believes that individual issues do in fact predominate and that strict liability and breach of implied warranty are therefore inappropriate subjects for class treatment. *See* discussion at pp. 426-27, *infra*.

All that is likely to remain against the fractionators, then, is a straight negligence case. And if plaintiffs' entitlement to relief depended simply upon proof of negligence, there would be little impediment to certification of the entire liability case as a class action. But, of course, more is required. Before any member of the class would be entitled to damages, there must be proof of a causal relationship between the member's HIV infection and the negligence of some defendant. Specifically, each class member must prove proximate cause. Here, again, this court's experience in the trial of *Poole v. Alpha* is invaluable.

There is no reason to think the proximate cause issue was more complex in the *Poole* trial than it would be in the cases of most of the putative class members here. The claim in *Poole* was that the decedent had used the concentrates of each of the four defendant fractionators. Plaintiff sought to hold all of them liable on the theory that his infection could have resulted from, or have been exacerbated by, his use of each of the four products. Both sides offered expert testimony on the question of whether a patient who is infected with HIV can be further injured by a subsequent exposure to the virus. At the close of the evidence, the court found that plaintiff had failed to present evidence sufficient to create a jury question and instructed the jury that liability could not be

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[5] In *Poole v. Alpha* the strict liability counts were dismissed because of the Illinois Blood Liability Act, which bars any action against a blood product manufacturer or distributor based on strict liability or breach of warranty. *Poole v. Alpha Therapeutic Corp.*, 698 F.Supp. 1367, 1370-71 (N.D.Ill.1988) (Moran, J.).

based on a theory of "aggravation, acceleration, or 'reinfection.' " The alleged error in withdrawing that issue from the jury is one of the points raised in the pending appeal to the Seventh Circuit. The importance of the issue for present purposes is to illustrate how complex the matter of proximate cause can be. This court has no way of knowing whether in future trials plaintiffs may be able to create a jury issue regarding aggravation from multiple exposures to contaminated concentrates provided by different manufacturers. In any event, to recover against any defendant, a plaintiff must show that he used contaminated concentrate provided by that defendant. Where a plaintiff is able to show that he used only one fractionator's concentrate, the task is reduced to proving contamination. But in the case of a long-term hemophiliac like Stephen Poole, the likelihood of exclusive use of one brand of concentrate is small. The brands seem to be regarded as fungible by treating physicians, and a patient may receive a brand simply because it is the one the supplier had in stock at the time. When a hemophiliac is hospitalized, the hospital provides the brand it has on hand, which may be different from the brand the patient had been using at home. It seems likely, therefore, that most class members are in the position of Stephen Poole--they used more than one brand of concentrate during the time they could have been infected with the HIV virus. It would almost never be possible to demonstrate by direct evidence that the virus was transmitted by a particular infusion of concentrate. Nor is circumstantial evidence likely to supply the causative link. The normal circumstances are simply the infusion from a particular lot of concentrate and the subsequent appearance of the virus in the blood of the patient, perhaps years later, after many additional infusions from other lots of concentrate.

Various doctrines have evolved to afford a possibility of recovery to a plaintiff in this predicament. One is the "market share" doctrine, a burden-shifting device which permits a plaintiff unable to show which defendant's product caused his injury to recover against the defendants in proportion to their share in the market of the offending product. Another doctrine is "alternative

liability," which, under certain circumstances, shifts the burden of proof on proximate cause to all defendants whose products could possibly have caused the injury. This is the theory adopted by this court in the *Poole* case, in the belief that this is the law of Illinois (a hotly disputed proposition, now moot because of the verdict in favor of defendants). See *Poole v. Alpha Therapeutic Corp.*, 696 F.Supp. 351, 354-56 (N.D.Ill.1988) (Moran, J.). But enough has been said to indicate that each of the many class members may be confronted with formidable problems, both factual and legal, in establishing whose negligence was a proximate cause of his HIV infection. The law in regard to proving proximate cause in a case of this kind is by no means uniform throughout the country. One jurisdiction might recognize the market share doctrine, another might recognize alternative liability, and a third might recognize neither, requiring instead that the plaintiff carry the burden of proving whose negligence in fact caused his injury. In some jurisdictions, the law on this subject is not settled.

On the proximate cause issue in the case against the fractionators, then, individual questions involving the particular circumstances of each plaintiff, and often the law peculiar to different jurisdictions, will clearly predominate. The only common question might be the issue of possible aggravation from multiple exposures.

In the case against the Foundation, proof of proximate cause will also involve a predominance of individual questions. Each class member will have to prove what acts or omissions of the Foundation he relied upon and how that reliance caused his HIV infection.

All of this does not mean that the question under Rule 23(b)(3) comes down to whether the common questions on negligence predominate over the individual questions on proximate cause, or vice versa. This is obvious from the second requirement of Rule 23(b)(3), "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." A class action involving both negligence and proximate cause could not be "superior" to any other method, simply because it is

not feasible. It may be that other methods --individual trials of the numerous individual claims being the only one that occurs to the court--are equally impracticable, but that does not help the plaintiffs. There is no way a single jury in this case could comprehend and determine the proximate cause questions that would be presented by the claims of the hundreds (plaintiffs say thousands) of class members in this case.

The only conclusion the court can draw is that the requirements of Rule 23(b)(3) are not satisfied by the case as a whole, because the proximate cause issue is unmanageable on a class basis.

**Certification of Particular Issues**

In view of the different conclusions the court has reached as to the negligence and proximate cause issues, the question naturally arises whether there is some way of carving out the common issues and treating them on a class basis. This brings us to a consideration of Rule 23(c)(4)(A), which provides that

> [w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues....

Plaintiffs argue that there are several areas suitable for certification under Rule 23(c)(4)(A). They see no problem with certifying the issues of negligence, strict liability, breach of implied warranty, and punitive damages. Plaintiffs' only concession appears to be that proximate cause would be problematic.

For their part, defendants find insuperable obstacles to certification of any issue. They again rely most heavily on their argument that the differing law of fifty-one different jurisdictions would make a joint trial impossible.

The court's view is that the common negligence and breach of fiduciary duty issues can appropriately be certified but that the remaining issues suggested by plaintiffs do not qualify.

**Negligence and Breach of Fiduciary Duty**

The arguments of the parties here are largely the same as those advanced in regard to the common issue question under Rule 23(a)(2) and (b)(3), *supra*, pp. 416-422. The court agrees with plaintiffs that there are common negligence issues that could practicably be tried in one action on a class basis. Defendants' argument that the law of each jurisdiction is different is, as indicated earlier in this opinion, not persuasive. Defendants' other major argument, that the products and procedures of each defendant were different, poses no obstacle to a jury determination of whether *each* defendant was negligent in any of the ways claimed by the plaintiffs. One of the verdict forms submitted to the jury in *Poole v. Alpha*, for instance, was as follows:

**SPECIAL VERDICT FORM A**

We, the jury, find that before Stephen Poole was infected with the HIV virus the following defendant(s) was (were) negligent in the following ways charged by the plaintiff:

| | Alpha | Cutter | Armour | Baxter |
|---|---|---|---|---|
| Use of paid plasma donors -- charge "a" | | | | |
| Failure to use surrogate testing -- charge "b" | | | | |
| Failure to warn -- charge "c" | | | | |

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|---|
| Failure to adopt methods to inactivate viruses -- charge "d" |
| Continued to market unpasteurized concentrates -- charge "e" |
| Failure to screen out previously rejected donors -- charge "f" |
| Failure to withdraw concentrate from the market -- charge "g" |

The court recalls no argument by the defendants in the *Poole* trial that this form of verdict was unworkable or that the jury would not understand it. As it turned out, the jury did not complete that form but instead signed the alternative form finding that none of the defendants had been negligent in any of the ways claimed by plaintiff. Here again, however, the ability of the jury to make *that* determination illustrates the feasibility of trying the defendants jointly on common allegations of negligence. In *Poole*, it was done with one plaintiff and multiple defendants. The fact that the present case involves multiple plaintiffs would add no difficulty, inasmuch as the issue that would make a joint trial of the claims of multiple plaintiffs impracticable, proximate cause, would not be involved.

Defendants argue that because of the different negligence law in the various jurisdictions there could be no joint trial of the plaintiffs' negligence claims consistent with the defendants' right

to due process. The claims of many of the class members arise only under the law of a particular jurisdiction, usually the state of their residence, since this is where they would have used the factor concentrates of one or more of the defendants. This does not necessarily mean that the law of that state would govern the action, because there could be situations where the law of more than one jurisdiction might apply. Due process requires " 'that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests such that choice of its law is neither arbitrary nor fundamentally unfair.' " *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S.Ct. 2965, 2978, 86 L.Ed.2d 628 (1984) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 101 S.Ct. 633, 639-40, 66 L.Ed.2d 521 (1981)). In this case, if the substantive negligence law of the various states really were as diverse as defendants claim, there could be no joint trial of the negligence issue (just as there obviously could be no joint trial of the proximate cause issue, given the diversity of approaches to that question). However, because this court concludes that the definition of negligence is substantially the same throughout the country (albeit some jurisdictions would impose a duty of ordinary care and others a more lenient standard), it sees no danger of a due process violation.[6]

The real question under Rule 23(c)(4)(A) is whether a verdict finding each of the defendants guilty or not guilty of the various charges of negligence would be useful in the resolution of any of the individual damage claims of the class members. (These would be individual damage claims now pending or later brought in the appropriate jurisdictions.) That depends upon whether the negligence issues could be framed in a way that would make the verdict of the jury a suitable predicate for further proceedings

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[6] "We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit." *Shutts*, 472 U.S. at 816, 105 S.Ct. at 2976.

under the negligence law of the particular jurisdiction under principles of collateral estoppel. *See generally Gray v. Lacke*, 885 F.2d 399, 406 (7th Cir.1989), *cert. denied*, 494 U.S. 1029, 110 S.Ct. 1476, 108 L.Ed.2d 613 (1990); *Cohen v. Bucci*, 905 F.2d 1111, 1112-13 (7th Cir.1990); *Falconer v. Meehan*, 804 F.2d 72, 75- 76 (7th Cir.1986); *County of Cook v. Midcon Corp.*, 773 F.2d 892, 898-904 (7th Cir.1985). There seems to be no reason the parties could not offer evidence relevant both to the questions of ordinary care and professional standard of care. The court has already indicated that it believes the ordinary negligence instructions given in *Poole v. Alpha* would be suitable for use in any other jurisdiction where ordinary negligence is the standard. It should be possible to draft instructions pertaining to the customary or professional standard of care in equally general terms, applicable to all jurisdictions where the defendants' duties would be measured by such a standard.

As far as the defendant Foundation is concerned, a verdict on the negligence and fiduciary duty allegations should be useable by or against the Foundation in any other jurisdiction where it might be made a defendant. It appears that the applicable negligence standard would be ordinary negligence, rather than a professional standard of care, but if that is not correct as to all jurisdictions, the jury could be instructed on both standards, just as in the case of the fractionator defendants.

The Foundation has not pointed out any likely differences in the law of the various jurisdictions as far as fiduciary obligations are concerned, and it appears that any jury verdict on those issues could also be given collateral effect.

In order for a verdict in this case to be of maximum use to the parties in collateral proceedings, the findings of the jury will have to take account of changes in scientific knowledge over the relevant period of time. Because there is no dispute that the fractionator defendants knew in the 1970s that their products could be contaminated with viruses and that heat kills viruses, plaintiffs' theory of negligence based on defendants' failure to heat treat their products even before the emergence of HIV is not especially

time-dependent. But regarding plaintiffs' allegations that defendants negligently failed to recognize soon enough that the new virus was blood-borne and to take adequate precautions to prevent its transmission by their products, time is critical. To recover on a theory of negligence occurring after the virus had been identified, a plaintiff would obviously have to show he had used a concentrate distributed by the particular fractionator after that time. He would also have to show that the particular defendant had been guilty of some negligent act or omission in regard to the particular lot of concentrate which caused his infection. The later the date of infection, the more information the defendants had and the better chance the plaintiff would have to persuade the jury that by that time the defendant knew or should have known that its blood donors should have been screened, its product heat treated, and the public warned of the danger of HIV infection. As plaintiffs suggest, jury verdict forms could be drafted in a way that would permit the jury to find the earliest date by which each defendant knew or in the exercise of ordinary care should have known of the danger that its concentrates would transmit HIV. The verdict form could also call for a finding as to the earliest date by which each defendant knew or should have known that a particular precaution --e.g., donor screening, heat treatment, warnings--was necessary to protect the users of its product, a finding as to whether the defendant failed to take that precaution, and a finding as to the date after which the defendant was negligent in failing to take the particular precaution. And, of course, the form would permit the jury to make a finding as to each defendant that it was not negligent at all or that it was not negligent in particular respects alleged by plaintiffs.

A separate set of forms would be drafted for the "standard of professional care" inquiry. The jury would find, as to each allegation of negligence, whether the particular defendant had violated the standard of care and, if so, the date the violation began.

Verdict forms of this kind are not found in form books, and they will have to be prepared with great care if the verdict of the

jury is to have the collateral utility contemplated in this opinion. The court is convinced that it can be done. The result would be the return of a verdict that would be useable for or against the defendants in jurisdictions throughout the country. If, for instance, a particular defendant were found not guilty of ordinary negligence and not to have violated any professional standard of care, that defendant would be absolved of any liability to any of the class members on a negligence theory. On the other hand, if a defendant is found to have been negligent in a particular respect after a particular date, that defendant would be subject to further prosecution by any class member who might attempt to prove that his HIV infection occurred as a result of using contaminated concentrate distributed by the defendant after that date. A class member who could not show he used the fractionator's concentrate after the "negligence date" would have no negligence claim against that fractionator based on acts or omissions occurring after that date. The various possibilities are obviously numerous, but enough has been said to demonstrate that certification of the negligence issues would be in the interest of judicial economy even though it is not feasible to certify the entire case as a class action.

The final question is whether certification of the negligence issue would, in the language of Rule 23(b)(3), be "superior to other available methods for the fair and efficient adjudication of the controversy." Defendants argue that the centralized discovery being conducted in the multidistrict litigation, followed by individual trials in the different jurisdictions when the cases are remanded at the completion of discovery, is a method of adjudication superior to Rule 23(c)(4)(A) certification of any particular issues. The court disagrees. It is true that, given the MDL proceeding, centralized discovery is going to occur whether or not there is any form of class certification. The relevant comparison is not between centralized discovery in the MDL and discovery in a class action, because there is no difference; this case is part of the MDL. The relevant comparison has to do with what happens *after* discovery. All defendants have to offer is a succession of separate trials in the various jurisdictions, litigating

over and over again the same questions of what was known, when it was known, what should have been done, when it should have been done, and whether it would have worked in any event. These are the same issues that occupied 5 1/2 weeks of a jury's time in *Poole v. Alpha*. Defendants want to do it repeatedly, before jury after jury, with the same witnesses monotonously repeating the testimony they have given many times before. (Defendants suggest that they would be willing to read the depositions of expert witnesses rather than having them testify live, but this takes almost as much time as having the witness appear live, and, in any event, the court is doubtful the parties would forego the presentation of live witnesses. In the *Poole* trial, most of the expert witnesses appeared live although their depositions had been taken and they had testified at previous trials.)

The court concludes that Rule 23(b)(4)(A) certification of the negligence and breach of fiduciary duty issues--specifically, whether the fractionator defendants were guilty of ordinary negligence or whether they violated any professional standard of care by doing or failing to do any of the things alleged by plaintiffs, and whether the defendant Foundation was guilty of negligence or breach of fiduciary duty--is appropriate and clearly superior to any other available method for the fair and efficient adjudication of those issues.

It is, of course, possible that for reasons the court does not presently foresee, the verdict of the jury would not be useable for collateral purposes in a particular case or perhaps even in a particular jurisdiction. But that would not detract from the efficiency of using the verdict in those cases and jurisdictions where it would be entitled to collateral effect.

**Strict Liability and Breach of Implied Warranty**

If defendants are correct in their contention that strict liability and breach of warranty are precluded by the "blood shield" laws of all jurisdictions, they will be entitled to prevail on their motions to dismiss these claims. In fact, the court does not understand defendants' resistance to certification of these issues if they really

believe they are entitled to dismissal. This is their chance to obtain a favorable judgment on these issues once and for all, precluding any individual claims by class members who do not opt out. The alternative is for the defendants to make these motions, probably filing identical briefs, in case after case throughout the country.

If, on the other hand, there are jurisdictions in which claims for strict liability and breach of warranty would lie, the court is not persuaded by plaintiffs' argument that these issues are closely enough related to the negligence question that they can efficiently be tried together. The problem lies in an area which neither side has addressed. Products can be negligently manufactured and yet be safe, merchantable and fit for the purpose intended. In this case, a particular vial of concentrate might escape HIV contamination for any number of reasons, regardless of whether it had been negligently manufactured. For example, the fractionator may have been negligent in failing to screen the blood donors for high-risk individuals, and yet the particular plasma pool may have had no infected donors. A vial of concentrate prepared from that plasma pool would not be contaminated and would therefore not breach any warranty of merchantability or fitness for a particular purpose and would not be unreasonably dangerous.

In short, the determination as to whether any of the defendants' products were unreasonably dangerous, or whether they breached any implied warranties, must be made on the basis of evidence relating specifically to the products which were used by each particular plaintiff and allegedly resulted in that plaintiff's infection. The determination is inseparable from the proximate cause issue: Unless a plaintiff can show (by whatever means is permitted by the law of the particular jurisdiction) that his infection was proximately caused by a particular defendant's product, he has not shown that product to be unfit, unmerchantable or unreasonably dangerous.

The court concludes, therefore, that individual issues predominate in the product liability and breach of warranty claims and that Rule 23(c)(4)(A) certification is inappropriate.

**Punitive Damages**

It appears to the court that unless a jury were to reach a decision as to whether a defendant's conduct caused actual damages, and, if so, the nature and extent of those damages, it is not in a position to make an informed decision as to the appropriateness of punitive damages. Because the issues the court will certify do not include proximate cause, the jury will make no determination of a causal connection between any conduct of a defendant and any injury to a plaintiff. While this court is of the view that repetitive assessments of punitive damages for the same course of conduct are undesirable, and that one assessment in a class action could be a superior method, this does not appear to be an appropriate case for that approach.

**CONCLUSION**

Plaintiffs may prepare a proposed certification order and class notice in conformity with this opinion and serve copies on the defendants by August 29, 1994. The parties should attempt to resolve any disputes as to language, and a hearing will be held on September 13, 1994, at 2:00 p.m. for the purpose of finalizing the certification order and class notice.

DATED: August 17, 1994

ENTER: _____

John F. Grady, United Stated District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| JONATHAN WADLEIGH, et al., | ) | |
| Plaintiffs, | ) | |
| | ) | No. 93 C 5969 |
| v. | ) | |
| RHONE-POULENC RORER, INC., ARMOUR PHARMACEUTICAL COMPANY, INC., MILES, INC., BAXTER HEALTHCARE CORPORATION, ALPHA THERAPEUTIC CORPORATION, and NATIONAL HEMOPHILIA FOUNDATION | ) | |
| Defendants. | ) | |

## ORDER

The fractionator-defendants' motion for reconsideration of this court's order and memorandum opinion of August 17, 1994, is denied.

The defendants' alternative motion for certification pursuant to 28 U.S.C. §1292(b) is also denied. An appeal at this time would not materially advance the ultimate termination of the litigation.

The defendants' opposition to class certification is based in part upon their contention that a class trial would not be manageable. The court believes otherwise, but clearly a reviewing court would be in a better position to assess the efficiency and fairness of a trial after it has taken place rather than before. Defendants argue that should the class certification order be reversed after the class trial is held, the result would be waste and inefficiency. However, the class trial, offering a possible alternative to the hundreds, if not thousands of individual trials proposed by the defendants (see Memorandum Opinion of August 17, 1994, at 34-36), will require a minute expenditure of time in comparison to what must occur if there is no class certification. Rather than asking a reviewing court to determine in advance that it will or will not work, the trial should be held and the result evaluated in light of the actual experience.

DATED: September 22, 1994

ENTER: _____

John F. Grady, United States District Judge

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
April 27, 1995

Before

Hon. Richard A. Posner, Chief Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge

| | |
|---|---|
| IN THE MATTER OF: | ) |
| RHONE-POULENC RORER | ) Petition for Writ of |
| INCORPORATED, *et al.*, | ) Mandamus to Hon. |
| *Petitioners.* | ) John F. Grady, |
| | ) United States District |
| | ) Judge, Northern |
| No. 94-3912 | ) District of Illinois, |
| | ) Eastern Division, in |
| | ) *Wadleigh et al. v.* |
| | ) *Rhone-Poulenc Inc.*, |
| | ) *et al.*, No. 93 C 5969 |

**ORDER**

On March 30, 1995, respondents filed a petition for rehearing with a suggestion of rehearing en banc. A vote of the active members of the Court was requested, and a majority has voted to deny a rehearing en banc.*

The petition is therefore DENIED.**

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* Judges Flaum, Ripple, and Rovner voted to grant the petition for rehearing en banc.

** Judge Walter J. Cummings did not participate in the vote for rehearing en banc.

IN THEUNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 94-3912

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RHONE-POULENC RORER INC.,
ARMOUR PHARMACEUTICAL COMPANY,
MILES INC., BAXTER HEALTHCARE CORPORATION, and
ALPHA THERAPEUTIC CORPORATION, Petitioners,

v.

HONORABLE JOHN F. GRADY, Judge,
United States District Court
for the Northern District of Illinois, Respondent.

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**PETITION FOR A WRIT OF MANDAMUS**

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This petition arises from *Wadleigh et al. v. Rhone-Poulenc Rorer Inc. et al.*, No. 93 C 5669 (N.D. Ill.)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 94-3912

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RHONE-POULENC RORER INC.,
ARMOUR PHARMACEUTICAL COMPANY,
MILES INC., BAXTER HEALTHCARE CORPORATION,
and ALPHA THERAPEUTIC CORPORATION, Petitioners,

v.

HONORABLE JOHN F. GRADY, Judge,
United States District Court
for the Northern District of Illinois, Respondent.

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**PETITION FOR A WRIT OF MANDAMUS**

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**CERTIFICATE OF INTEREST**

The undersigned, one of the counsel of record for the Petitioners, furnishes the following list in compliance with Circuit Rule 26.1:

(1) **Parties**

(A) RHONE-POULENC RORER INC.

(B) ARMOUR PHARMACEUTICAL COMPANY

(C) MILES LABORATORIES, INC., d/b/a/ CUTTER LABORATORIES, INC.

(D) BAXTER HEALTHCARE CORPORATION

(E) ALPHA THERAPEUTIC CORPORATION

(2) **Corporate Information**

(A) RHONE-POULENC RORER INC.

(i) RHONE-POULENC RORER INC.'S parent is RHONE-POULENC S.A.

(ii) No publicly held companies own 10% or more of the stock of RHONE-POULENC RORER INC. except its parent RHONE-POULENC S.A.

(B) ARMOUR PHARMACEUTICAL COMPANY

(i) ARMOUR PHARMACEUTICAL COMPANY'S parent is RHONE-POULENC RORER INTERNATIONAL (HOLDINGS) INC.

(ii) No publicly held companies own 10% or more of the stock of ARMOUR PHARMACEUTICAL COMPANY. RHONE-POULENC RORER INC., which owns 100% of the stock in ARMOUR PHARMACEUTICAL COMPANY'S parent RHONE-POULENC RORER INTERNATIONAL (HOLDINGS) INC., has issued shares of stock to the public.

(C) MILES LABORATORIES, INC., d/b/a/ CUTTER LABORATORIES, INC.

(i) MILES LABORATORIES, INC.'S parent is BAYER, A.G.

(ii) Not applicable.

(D) BAXTER HEALTHCARE CORPORATION

(i) BAXTER HEALTHCARE CORPORATION'S parent is BAXTER INTERNATIONAL, INC.

(ii) BAXTER INTERNATIONAL INC. owns 100% of the stock of BAXTER HEALTHCARE CORPORATION.

(E) ALPHA THERAPEUTIC CORPORATION

(i) ALPHA THERAPEUTIC CORPORATION'S parent is GREEN CROSS CORPORATION.

(ii) Not applicable.

**(3) Law Firms**

(A) RHONE-POULENC RORER INC.

(i) Sidley & Austin

(B) ARMOUR PHARMACEUTICAL COMPANY

(i) Sidley & Austin

(C) MILES LABORATORIES, INC., d/b/a/ CUTTER LABORATORIES, INC.

(i) O'Connor, Cohn, Dillon & Barr

(ii) Piper & Marbury

(D) BAXTER HEALTHCARE CORPORATION

(i) Dechert, Price & Rhoads

(E) ALPHA THERAPEUTIC CORPORATION

(i) Knapp, Petersen & Clarke

(ii) Wildman, Harrold, Allen & Dixon

By:_____
One of the Attorneys for
Petitioners

December 19, 1994

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-3912

RHONE-POULENC RORER INC.,
ARMOUR PHARMACEUTICAL COMPANY,
MILES INC., BAXTER HEALTHCARE CORPORATION,
and ALPHA THERAPEUTIC CORPORATION, Petitioners,

v.

HONORABLE JOHN F. GRADY, Judge,
United States District Court
for the Northern District of Illinois, Respondent.

## PETITION FOR A WRIT OF MANDAMUS

## INTRODUCTION

This petition challenges the District Court's ill-conceived use of Rule 23(c)(4)(A) in its effort to manage AIDS-related multidistrict and multistate litigation. The District Court has certified a nationwide "issue" class for the sole purpose of determining whether defendants--who process blood derivatives used to treat hemophilia--are "guilty" of "ordinary negligence" under a purportedly uniform nationwide standard conceived by the Court. *The proposed class trial will not determine whether defendants are liable to any plaintiff or absent class member* because the District Court correctly concluded this case is *not* appropriate for Rule 23(b)(3) class certification. Rather, the class trial will produce an extraordinarily long and hopelessly complex special verdict form by which the jury will attempt to make findings about each of the various defendants' "guilt" on

the wide variety of negligence theories proposed by plaintiffs. The District Court contemplates that such findings will then be used by the parties in hundreds--perhaps thousands--of individual trials in federal and state courts around the country.

The District Court's plan will turn the federal multidistrict and similar state court proceedings into a tangle from which the parties and the courts may never extricate themselves. Mandamus should issue because these defendants (I) have a clear right to relief and (II) will be irremediably injured if they must wait until final judgment to vindicate that right. *Maloney v. Plunkett,* 854 F.2d 152, 155 (7th Cir. 1988). Specifically, mandamus is appropriate for the following reasons:

I(A). The certification of a negligence issue class is predicated on the assumption that defendants can be tried under a uniform national standard for "negligence." No such standard exists. The certification order disregards critical differences in state law and applies a *de facto* federal legal standard, in violation of the predominance requirement of Rule 23(b)(3), the *Erie* doctrine, and the parties' right to due process. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

I(B). Class certification is not a superior means of proceeding with this litigation. First, the proposed class trial will be unmanageable, involving hundreds of distinct issues upon which a jury will be required to return specific findings. Second, the product of that class trial may be nothing more than an advisory verdict, entitled to no preclusive effect whatsoever in the trials of individual class members. Third, it will be necessary to re-introduce at the trials of individual class members the evidence from the class trial to resolve the following issues:

- whether the alleged negligence of one or more of the fractionator defendants is the cause-in-fact of harm to the plaintiff;

- whether the alleged negligence of one of more of the fractionator defendants is the proximate cause of harm to the particular plaintiff;
- whether any defenses (*e.g.*, learned intermediary, statute of limitations, comparative negligence) apply;
- whether any other defendants (such as other providers of blood-based therapies, hemophilia treatment centers, physicians, hospitals, and patient advocacy organizations) are liable;
- whether the plaintiff is entitled to damages and, if so, the amount of damages;
- the proportionate fault of any defendants found liable (crossclaims are pending in all MDL cases); and
- any other theories of recovery asserted by plaintiffs, including strict liability, breach of warranty, and concert of action.

Thus, rather than serve the interests of judicial economy, the proposed class trial will actually generate additional litigation.

II. The District Court's error cannot be remedied through normal appellate review. Indeed, the class verdict may not be appealable following the class trial. *See Bieneman v. Chicago*, 864 F.2d 463, 465 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989). Even if the verdict is immediately appealable, the legal effect of the class trial will have to be determined in each of the subsequent individual trials--leading to a proliferation of litigation. In addition, the piecemeal litigation of plaintiffs' negligence claims will give rise to Seventh Amendment and Due Process challenges to any final "verdict" entered as a result of these proceedings. *See Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931).

* * *

Four other courts have recognized that the issues presented in these cases are not proper subjects for class treatment. *See D.K. v. Armour Pharmaceutical Co.*, No. L-8154-93 (N.J. Super.

June 9, 1994) (App. 109); *Gannon v. Cutter Laboratories*, No. C-85-20078 (N.D. Cal. April 11, 1988) (App. 123); *Doe v. Cutter Biological, Inc.*, No. 87-0232 (D. Hawaii Dec. 8, 1987) (App. 137); *Doe v. Sno-Isle Community Blood Bank*, No. 86-2-16308-5 (Wash. Super. June 29, 1987) (App. 145). The District Court ignored the legal analysis and common sense in these opinions.

The District Court's attempt to streamline this litigation would loose Rule 23 from its moorings. Like federal statutes, the Rules of Civil Procedure derive their force and effect from Congress. *See* 28 U.S.C. § 2074 (Rules Enabling Act, as amended). Federal courts are bound to apply the rules as written. They may not rewrite the rules in response to specific cases. As this Court has held, "[t]o craft a judicially-created special provision [applicable to certain types of lawsuits] . . . would violate the Rules Enabling Act that vests authority for such rulemaking in the Supreme Court and Congress." *Robinson v. Turner*, 15 F.3d 82, 85 (7th Cir. 1994). The District Court's interpretation of Rule 23(c)(4) does not comport with this principle. To the contrary, the litigation plan proposed by the District Court is so different from anything contemplated by the Rules Advisory Committee, the Supreme Court or the Congress that its adoption would usurp the authority of those bodies under the Rules Enabling Act.[1] This Court should therefore direct the District Court to withdraw its class certification order.[2]

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[1] The Notes of the Advisory Committee give, as an example of an issue suitable for class treatment pursuant to Rule 23(c)(4)(A), the "adjudication of liability to the class" with subsequent individual proof of "the amount of their respective claims. Fed. R. Civ. P. 23(b) Advisory Committee's Note, 39 F.R.D. 69, 106. The Committee explicitly disapproved of the use of Rule 23 in situations in which "significant questions . . . of liability . . . affecting the individuals in different ways" would result in "an action conducted nominally as a class action [degenerating] in practice into multiple lawsuits separately tried." *Id.* at 103.

[2] Since notice to the class has not yet issued, vacatur of the certification order will not confuse purported class members or impede the MDL proceeding.

## JURISDICTION

This lawsuit was filed in United States District Court pursuant to 28 U.S.C. § 1332. The Court of Appeals has jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651.

## STATEMENT OF THE CASE

Approximately 300 lawsuits involving some 400 named plaintiffs have been filed by American hemophiliacs who claim to have been infected with the human immunodeficiency virus ("HIV") through the plasma-based therapies used to control their hemophilia.[3] Petitioners, the fractionator defendants, are four of the companies that provide two types of plasma derivatives used in such therapy--Factor VIII and Factor IX concentrates.[4] Approximately 60 percent of these cases are pending in various state courts. The federal cases are consolidated for pretrial purposes in the Northern District of Illinois (Grady, J.). *See In Re: Factor VIII and Factor IX Concentrate Litigation*, MDL No. 986 (Dec. 7, 1993) (App. 1). *See generally* 28 U.S.C. § 1407.

Of the 13 cases tried to verdict to date, all but one have resulted in final judgment for the defendants; the sole plaintiff's judgment is on appeal. Although it has been estimated that from 6,000 to 10,000 persons with hemophilia in the United States have been infected with HIV, in the nine years since the first case was filed only 3 to 5% of those persons have chosen to initiate litigation against the processors of the plasma derivatives used to treat their disease.

This petition arises from *Wadleigh v. Rhone-Poulenc Rorer*, No. 93 C 5969--a purported nationwide class action initiated by a consortium of plaintiffs' counsel against the fractionator

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[3] Approximately two-thirds of those cases were filed by class counsel *after* the filing of this purported class action.

[4] Those companies are Armour Pharmaceutical Company, Miles Inc., Baxter Healthcare Corporation, and Alpha Therapeutic Corporation.

defendants and the National Hemophilia Foundation ("NHF").[5] The named plaintiffs seek to represent (a) all hemophilia patients who allegedly were infected with HIV as a result of using factor concentrates processed by the fractionators and (b) the relatives and legal representatives of these hemophilia patients. Plaintiffs have asserted claims against the fractionator defendants for negligence, strict product liability, breach of implied warranty, and concert of action and against the NHF for breach of fiduciary duty. App. 33.

On August 17, 1994, the District Court entered the first of several memorandum opinions and orders relating to plaintiffs' motion for class certification.[6] The Court first held that plaintiffs had met the Rule 23(a) requirements for class certification. The Court expressly found, based on what it mistakenly believed to be the allegations of the complaint, that plaintiffs were adequate class representatives and that their claims were typical of those of members of the purported class. Tab A at 13.[7]

The Court held, however, that plaintiffs' claims for negligence, strict product liability, breach of warranty, and punitive damages could not be maintained as Rule 23(b)(3) class

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[5] Also named as defendant in the class litigation is Rhone-Poulenc Rorer Inc., the second-tier parent corporation of Armour.

[6] Plaintiffs' class certification motion addressed their claims for negligence, strict product liability, and breach of implied warranty. In May of 1994, plaintiffs amended their complaint to add a claim for concert of action. App. 60-61. The District Court requested briefing on certification of that claim in the fall of 1994.

[7] The allegations referred to in the memorandum opinion do not appear in the amended complaint. *See* App. 33. Nor had any of the named plaintiffs been deposed at the time the Court made this finding. The order governing discovery procedures for *Wadleigh* and all of the MDL cases provides, *inter alia*, that witnesses may only be deposed once in conjunction with the MDL proceedings. App. 22-24. Because the purported class representatives had not (and in some cases still have not) produced their initial disclosure statements and medical records pursuant to the terms of the discovery order, plaintiffs' class certification motion was briefed without the benefit of adequate discovery regarding the specific claims of the purported class representatives.

actions because individual issues predominated over common ones. *See* Tab A at 21-22, 26, 36-38. In particular, the Court concluded that plaintiffs' negligence claims could not be certified because, "[o]n the proximate cause issue, . . . individual questions involving the particular circumstances of each plaintiff, and often the law peculiar to different jurisdictions, will clearly predominate." Tab A at 25. The Court announced, however, that it would certify a class pursuant to Rule 23(c)(4)(A) for the limited purpose of determining whether the fractionator defendants were "guilty of ordinary negligence." *See id.* at 35-36.

The District Court arrived at this result by limiting its focus to just one part of a cause of action for negligence--what the Court called "ordinary negligence." *See id.* at 18. The Court stated that this issue could be decided on a nationwide basis because it "believed" that "the definition of ordinary negligence is substantially identical in all jurisdictions." *Id.* The Court rejected the fractionators' argument that states apply different standards in determining how foreseeable a risk must be in order to give rise to a legal duty. The Court stated that the "general rule" is that "a defendant has a duty to guard against unknown but allegedly foreseeable risks." *Id.* at 20. The Court also rejected the argument that certification should be denied because different states apply different standards of care in cases such as this. The Court stated: "The fact that the defendants might be subject to different duties in different jurisdictions--customary or professional standard in some and ordinary care in others--does not create a multiplicity of issues." *Id.* at 21.

The District Court then described the extraordinarily detailed verdict form that it proposes to "try" the fractionator defendants for "ordinary negligence":

> As plaintiffs suggest, the jury verdict forms could be drafted in a way that would permit the jury to find the earliest date by which each defendant knew or in the exercise of ordinary care should have known of the danger that its

> concentrates would transmit HIV. The verdict form would also call for a finding as to the earliest date by which each defendant knew or should have known that a particular precaution--e.g., donor screening, heat treatment, warnings--was necessary to protect the users of its product, a finding as to whether the defendant failed to take that precaution, and a finding as to the date after which the defendant was negligent in failing to take the particular precaution. And, of course, the form would permit the jury to make a finding as to each defendant that it was not negligent at all or that it was not negligent in particular respects alleged by plaintiffs.
>
> A separate set of forms would be drafted for the "standard of professional care" inquiry. The jury would find, as to each allegation of negligence, whether the particular defendant had violated the standard of care and, if so, the date the violation began.

*Id.* at 33.

After the class trial, the District Court plans to return the individual MDL cases to courts around the country for trial.[8] Also at that time, the District Court apparently contemplates that class members who have not filed individual lawsuits will be able to initiate entirely *new lawsuits* in order to take advantage of any trial verdict in favor of the class. The District Court believes that this approach will be superior to trying each plaintiff's claim individually from the outset because the class

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[8] Presumably, any state court actions that have been held in abeyance pending the outcome of the "issue" class trial will also resume.

verdict may be deemed binding on the parties in some--if not all--jurisdictions. *Id.* at 35.[9]

On September 22, 1994, the District Court summarily denied the fractionator defendants' motion for reconsideration. App. 78. The Court also refused to certify its August 17 decision for immediate appeal pursuant to 28 U.S.C. § 1292(b).[10] The Court subsequently denied plaintiffs' motion to certify a class on concert of action. App. 80.[11] On November 3, 1994, the Court entered its formal class certification order. Tab B.[12]

On December 6, 1994, the Court denied defendants' motion to amend the class certification order to confirm that all negligence issues would be tried in the class trial or barred. App. 96-97. The Court stated that consideration of negligence issues applicable to only a few class members would cause the trial to "degenerate" into a "multiplicity of individual trials." App. 91-92. The Court therefore decided to leave disposition of such issues to the Phase 2 trial courts. App. 97. The Court acknowledged that omission of these issues from the class trial would give rise to questions about the trial's preclusive effect. App. 91-92, 96-97.

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[9] Applying a similar rationale, the Court certified a 23(c)(4)(A) class to determine whether the NHF had breached its fiduciary duty to plaintiffs. Tab A at 35-36.

[10] During argument of defendants' motion for 1292(b) certification, plaintiffs' lead counsel urged that mandamus was the appropriate vehicle for any challenge to the class certification order. App. 74.

[11] On December 13, 1994, the Court denied plaintiffs' motion to reconsider its order denying certification of a class on concert of action.

[12] At the same time, the District Court imposed strict limitations on discovery by the fractionator defendants. In particular, the Court barred defendants from deposing MDL plaintiffs-- including the purported class representatives--prior to the class trial unless their health seriously deteriorated. *See* App. 85-86.

In hearings on December 6 and 13, 1994, the Court approved plaintiffs' class notification plan.[13] Defendants objected to both the form of notice and to plaintiffs' distribution method. The form does not tell class members that they must file separate lawsuits to benefit from any class verdict. Nor does it state that the preclusive effects of any class verdict are unclear. *See* App. 103-08. The plan for distributing notice depends largely on the cooperation of organizations that are not parties to this litigation. Specifically, class counsel will ask nonparty hemophilia treatment centers and the NHF to distribute notice. These mailings will be supplemented by publication of summary notice in *USA Today* and on electronic bulletin boards. App. 98-102. Neither the Court nor the parties will have a comprehensive list of class members to whom notice was mailed.[14] The process of notifying class members is scheduled to begin on January 13, 1995.

## ISSUE PRESENTED

Should the District Court be directed to withdraw an order certifying a class for purposes of determining whether defendants are "guilty" of "ordinary negligence" where --

(a) there is no applicable uniform, nationwide "negligence" standard;

(b) the proposed class trial will be unmanageable, its verdict may well be an advisory opinion, and it will not shorten subsequent trials for individual class members and defendants; and

(c) the defendants will be irreparably injured by being subjected to an improper and, indeed,

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[13] The Court has announced that it will approve the form of notice that appears at pages 103 to 108 of the Appendix. To date, the Court has not entered a written order doing so.

[14] The Court stated that, if defendants believe these methods are insufficient to assure the preclusive effect of any verdict, they may provide additional notice, apparently at their expense. App. 102.

unconstitutional proceeding that will result in a proliferation of litigation?

## BACKGROUND

### I. Treatment of Hemophilia

Hemophilia is an incurable, hereditary disorder characterized by deficiencies of certain clotting factors in the blood. Individuals with deficiencies of clotting "Factor VIII" have what is known as Hemophilia A. Individuals with deficiencies of "Factor IX"--a different blood protein--have what is known as Hemophilia B. *See generally D.K. v. Armour Pharmaceutical Co.*, No. L-8154-93, slip op. at 5-6 (N.J. Super. June 9, 1994) (App. 115-16).

Hemophilia is treated by adding the missing clotting factor to a hemophiliac's bloodstream. Freeze-dried concentrates of Factor VIII and Factor IX were developed in the late 1960s and early 1970s by petitioners and others and largely replaced the cumbersome and less effective therapies (whole blood, frozen plasma, cryoprecipitate) which had previously been used. Between 1968 and 1983, the life expectancy of persons with hemophilia in the United States doubled. App. 170. The quality of life also improved significantly; blood factor concentrates made possible "the return to a full range of activities for many patients who were previously wheelchair-bound." App. 211.

Factor VIII and Factor IX concentrates, which were processed at different times by different defendants using different methods, are not interchangeable.[15]

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[15] Specifically, each fractionator is separately licensed by the Food and Drug Administration ("FDA") to use its own proprietary methods in the preparation of Factor VIII and Factor IX concentrates. The technology used by each fractionator is not available to other fractionators. Each fractionator obtains plasma from different FDA-regulated plasma centers, located in different geographic areas. Moreover, the proprietary methods of all four fractionator defendants and the centers from which they obtain plasma have changed over time. App. 193, 195.

## II. AIDS and Hemophilia: A Medical Chronology

The first cases of the disease now known as AIDS were reported in June and July of 1981. App. 158-162. As more cases were diagnosed, it appeared that AIDS was especially prevalent among certain groups, namely homosexual males with multiple partners, intravenous drug users, and recent immigrants from Haiti. *See generally Kozup v. Georgetown Univ.*, 663 F. Supp. 1048 (D.D.C. 1987), *aff'd in part and vacated in part*, 851 F.2d 437 (D.C. Cir. 1988).

In July of 1982, the first three cases of a form of pneumonia common in those with AIDS were reported in persons with Hemophilia A. App. 163.[16] Seventeen months later, the first case of AIDS was reported in a person with Hemophilia B. App. 175. It was not until 1984 that the medical community reached a consensus that AIDS was transmissible by blood. *Kozup*, 663 F. Supp. at 1052; *Jaime v. Saint Joseph Hosp. Found.*, 853 S.W.2d 604, 611 (Tex. App. 1993). The HIV retrovirus was identified as the cause of AIDS in the spring of 1984.

In the fall of 1984, the Centers for Disease Control ("CDC") conducted experiments to determine if HIV was inactivated by heat-treatment processes that had recently been approved for Factor VIII.[17] The experiments demonstrated that HIV was

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[16] During the winter of 1982-83, each of the fractionators announced donor screening programs. In March of 1983, the Centers for Disease Control, the National Institutes of Health, and the Food and Drug Administration ("FDA") issued joint recommendations for reducing the potential risk of transmitting AIDS through blood products, and the FDA promulgated specific recommendations for donor screening. App. 166-67. The fractionators' existing donor screening programs complied with and, in some instances, exceeded the new government recommendations.

[17] Fractionator defendants developed heat-treated concentrates because it was known that a form of hepatitis could be transmitted through blood and its derivatives. *See Hoemke v. New York Blood Center*, 912 F.2d 550, 553 (2d Cir. 1990). The FDA approved the first heat-treated Factor VIII concentrates during 1983 and 1984; approval of heat-treated Factor IX concentrates came later. Each of the fractionators' heat treatment processes were different. Many

inactivated by heat treatment. Accordingly, NHF's Advisory Committee suggested that physicians "strongly consider" placing hemophiliacs on heat-treated concentrates. App. 177 ¶ I(C). In 1985, that recommendation was revised to urge that only heat-treated concentrates be used and that they should be used instead of other plasma-derived therapies, such as cryoprecipitate, which cannot be heat treated. App. 180 ¶ I(A).

In March of 1985 the FDA licensed a test to detect antibodies to HIV. *Kozup*, 663 F. Supp. at 1052. All plasma donations collected after the test became available were screened.

* * *

By using the newly developed test on stored serum samples, CDC epidemiologists have determined that "62-89% of the U.S. hemophilia A patients who were treated with factor VIII concentrate, and who eventually seroconverted [had been HIV-infected], did so prior to January 1983." App. 189. Thus, before anyone knew that AIDS was transmissible by blood, a large proportion of American hemophiliacs were infected with HIV.

## STANDARD FOR ISSUANCE OF THE WRIT

The writ of mandamus "is a safety valve . . . in the final-judgment rule" and therefore "cannot be wholly reduced to formula." *Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir. 1988). As a general matter, however, a party seeking issuance of the writ must meet two requirements. First, the petitioner must establish a clear right to relief. *In the Matter of Sandahl*, 980 F.2d 1118, 1119 (7th Cir. 1992); *Maloney*, 854 F.2d at 154. *See also Will v. United States*, 389 U.S. 90, 96 (1967). Second, the petitioner must show that the District Court's error is

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physicians were reluctant to prescribe the new heat-treated concentrates because of concern that patients might develop antibodies to heated-treated Factor VIII that would prevent future life-saving treatments with factor concentrates. Also, clinical studies did not demonstrate that the heat-treated concentrates were entirely effective in inactivating hepatitis viruses. *See* App. 196.

"irremediable by the regular appellate remedies." *Maloney*, 854 F.2d at 154. Although "the ordinary inconvenience of a new trial cannot justify the use of the writ, . . . extraordinary inconveniences may do so." *Id.* at 155. *See, e.g., In the Matter of Continental Illinois Sec. Litig.*, 985 F.2d 867 (7th Cir. 1993) (issuing mandamus to order Judge Grady to expedite resolution of a dispute over the award of attorney fees in a class action).[18] Erroneous certification of a class can give rise to extraordinary inconveniences warranting issuance of mandamus. *See e.g., In re Temple*, 851 F.2d 1269 (11th Cir. 1988); *In re Bendectin Products Liability Litig.*, 749 F.2d 300 (6th Cir. 1984), *cert. denied*, 488 U.S. 1006 (1989); *In re Exterior Siding & Aluminum Coil Antitrust Litig. (M.D.L. 454)*, 696 F.2d 613 (8th Cir. 1982), *cert. denied*, 464 U.S. 866 (1983); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976), *cert. denied*, 493 U.S. 959 (1989); *Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975); *McDonnell Douglas Corp. v. United States Dist. Court for Cent. Dist.*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *See also Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364, 1368 n.5 (7th Cir. 1976), *cert. denied*, 429 U.S. 907 (1976) (mandamus appropriate means for challenging arbitrary class certification decisions) (dictum).

## SUMMARY OF ARGUMENT

This Court should issue a writ of mandamus directing the District Court to vacate its class certification order. While the District Court may hope to conserve judicial resources by holding an "issue" class trial, the Court's certification order is

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[18] For examples of recent Seventh Circuit cases in which mandamus has issued, see *In the Matter of Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994) (ordering District Court to recall its *sua sponte* remand of a case that had been removed from state court); *Sandahl*, 980 F.2d at 1118 (ordering District Court to vacate an order disqualifying a law firm); *In the Matter of Shell Oil Co.*, 970 F.2d 355 (7th Cir. 1992) (ordering District Court to rescind a remand of a properly removed case); *United States v. Spilotro*, 884 F.2d 1003 (7th Cir. 1989) (ordering District Court to vacate an order modifying a prison sentence); and *Maloney*, 854 F.2d at 152 (ordering District Court to withdraw an order dismissing a seated jury).

based on a manifestly incorrect and unconstitutional interpretation of Rule 23(c)(4)(A). That Rule authorizes the class trial of particular issues, but it does not empower the Court to disregard critical distinctions in state law or to subject defendants to a one-sided advisory trial that will complicate--rather than simplify--subsequent proceedings.

I. The fractionator defendants are clearly entitled to relief because differences in the way that the States define "foreseeability"--the pivotal legal concept in this case--foreclose certification under Rule 23(b)(3).[19] By ignoring these differences in state law, the District Court is violating the *Erie* doctrine and the parties' rights to due process. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). By ignoring the management problems that will result from the proposed class trial, the Court is creating a litigation imbroglio that will continue into the next century.

II. The Court of Appeals should correct these errors now. If review is deferred--until after the class trial or after the individual trials of class members--the fractionators will be subjected to unnecessary litigation and to a series of trials that will violate their Seventh Amendment and Due Process rights.

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[19] Rules 23(a) and 23(b)(3) apply to classes certified pursuant to Rule 23(c)(4)(A). *See* 7B Wright & Miller, *Federal Practice and Procedure* § 1790 at 284; *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993); *In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985).

## I. MANDAMUS SHOULD ISSUE BECAUSE THE FRACTIONATOR DEFENDANTS ARE CLEARLY ENTITLED TO RELIEF FROM THE DISTRICT COURT'S ERRONEOUS CLASS CERTIFICATION ORDER.

### A. The Class Should Not Have Been Certified Because Common Issues of Law Do Not Predominate.

A federal court sitting in diversity must decide state common law claims on the basis of state law. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Accordingly, in nationwide class actions, the District Court must identify any conflicts in the law of the interested states and, if conflicts exist, determine the appropriate law to apply to each class member's claim. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016-19 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *In re School Asbestos Litigation*, 789 F.2d 996, 1010 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1986); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 265 (S.D. Cal. 1988).[20] When the tort law of several states is involved, certification of a national class is usually impossible:

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[20] In Illinois--where the class action was filed--the Court must examine the contacts of various states with the litigation and apply the law of the state with the "most significant relationship" to the issues. *Abbott Lab. v. Nutramax Prods.*, 844 F. Supp. 443, 446 (N.D. Ill. 1994). *See Dr. Franklin Perkins School v. Freeman*, 741 F.2d 1503, 1520 (7th Cir. 1984). "The most significant factor is the place of injury." *Abbott Lab.*, 844 F. Supp. at 446. *See generally Restatement (Second) of Conflicts of Laws* § 146. Since most potential class members have no relationship to the state of Illinois, their claims must be determined under the law of some other state. For cases consolidated through the MDL proceeding, the choice of law rules of the transferor state apply. *See Johnson v. Continental Airlines Corp.*, 964 F.2d 1059, 1062 (10th Cir. 1992).

Separate legal issues predominate over common ones. *See* Fed. R. Civ. P. 23(b)(3).[21]

Here, the District Court never analyzed plaintiffs' claims under choice of law principles. Rather, the Court relied on its "belief" that negligence law is uniform nationwide. Tab A at 18. The District Court was mistaken. The general concept of negligence --"conduct which falls below the standard established by law for the protection against others against unreasonable risk"--exists in the law of every state. Prosser and Keeton on Torts § 43, at 280 (5th ed. 1984); *id.* § 31, at 170. However, states do not define the "standard established by law" uniformly. Rather, significant variations predominate in state law governing foreseeability and the standard of care owed to plaintiffs.

**1. Different States Employ Different Standards of Foreseeability To Define the Scope of a Defendant's Duty.**

Most hemophiliacs who have been infected with HIV were exposed before that retrovirus was identified and before there was any consensus in the medical community that AIDS could be transmitted through blood products. App. 194. Plaintiffs allege that the fractionators are nevertheless liable because they (a) knew that a form of hepatitis could be transmitted through factor concentrates and (b) therefore had a legal duty to protect against transmission of any virus--known or unknown--including, serendipitously, the unheard of retrovirus, HIV. *See* Tab A at 19. This so-called "serendipity" theory--which will fail under all but perhaps the most expansive state laws governing foreseeability--is at the heart of plaintiffs' case in the present negligence issue class action.

The District Court predicated its decision to certify a negligence issue class on the supposition that the serendipity

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[21] *See, e.g., Coe v. National Safety Ass'n*, 137 F.R.D. 252, 254 (N.D. Ill. 1991) (state law claims were "inappropriate for class treatment, since the proposed class consists of citizens of at least forty-eight states, and plaintiffs' claim necessarily includes claims which arose in each of those states").

theory creates a jury question under the "general rule" that "a defendant has a duty to guard against unknown but allegedly foreseeable risks" and that the Court can therefore properly give a single jury instruction on foreseeability that reflects the law of all jurisdictions. *See* Tab A at 19-20, 23-24, 30.[22] More specifically, the Court stated that it will give an instruction based on Section 435 of the Restatement (Second) of Torts:

> Foreseeability of Harm or Manner of Its Occurrence
>
> (1) If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.
>
> (2) The actor's conduct may be held not to be a legal cause of the harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the Court highly extraordinary that it should have brought about the harm.

Tab A at 20; *id.* at 30. Section 435 does not, however, reflect the "general" definition of foreseeability as a component

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[22] The respondent Court allowed the serendipity theory to go to the jury in a previous factor concentrate case, *Poole v. Alpha*, No. 86 C 7623 (N.D. Ill.). In *Poole*, the District Court instructed the jury:

> It is not necessary for plaintiff to prove that the defendants could have foreseen the HIV virus itself. The element of foreseeability would be satisfied if a defendant could reasonably have foreseen a significant risk that as a result of its collection or manufacturing processes some unknown agent capable of causing serious illness could be transmitted in its concentrate.

The *Poole* jury returned a verdict in favor of the fractionator defendants, finding that no defendant had breached any of the duties alleged. The plaintiff's appeal, *Gruca v. Alpha*, No. 94-1893, is currently being briefed.

of duty.[23] State definitions of foreseeability vary widely--and therefore preclude certification of a negligence class.

Courts of Appeals, applying the law of two different states, have already rejected the proposition that the fractionators had a duty to foresee the AIDS epidemic in the hemophilia community. In *McKee v. Cutter Laboratories*, the Court of Appeals for the Sixth Circuit stated:

> We are mindful of the tragic consequences of AIDS for plaintiff, and for society, but hindsight opinions as to its possible prevention, before the disease-causing virus and the efficacy of preventative measures were discovered, are not sufficiently probative to preclude summary judgment.

866 F.2d 219, 224 (6th Cir. 1989) (affirming summary judgment in favor of fractionator defendant under Kentucky law). Similarly, in *Jones v. Miles Laboratories*, the Eleventh Circuit stated:

> The amount of knowledge about AIDS has grown considerably since the events which gave rise to this case. In such a situation, we too easily forget that not so long ago AIDS did not have a name, and the scientific community had little idea of how to control its spread. Yet hindsight and accusations must not be allowed to determine controversies such as this case involves. [Plaintiff] has died, through no fault of his own, but neither can we say that the fault lies with Miles Laboratories.

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[23] Indeed, Section 435 is actually addressed to proximate causation--not to how foreseeable a risk must be in order to give rise to a legal duty. In Pennsylvania, it is reversible error for the court to instruct on foreseeability by reading Section 435 of the Restatement. *Brown v. Tinneny*, 421 A.2d 839, 841 (Pa. Super. Ct. 1980). The application of that section is reserved exclusively to the court.

887 F.2d 1576, 1582 (11th Cir. 1989) (affirming judgment notwithstanding the verdict in favor of fractionator defendant under Georgia law). Litigation involving AIDS and blood transfusions has produced similar results. *See Hoemke v. New York Blood Center*, 912 F.2d 550, 553 (2d Cir. 1990) (affirming direction of verdict against plaintiff under New York law). *Cf. Jaime v. Saint Joseph Hosp.*, 853 S.W.2d 604, 614-15 (Tex. Ct. App. 1993) (affirming entry of summary judgment against plaintiff on ground that plaintiff's theory is based on hindsight). From these precedents, it is clear that there is no "general" nationwide concept of foreseeability that encompasses plaintiffs' serendipity theory. Rather, state law on foreseeability varies and is influenced by public policy considerations unique to each state. *See infra* at Part I(A)(3). A sampling of jury instructions on foreseeability reinforces that conclusion.

For instance, New Hampshire includes an element of probability in its instruction on foreseeability:

> A person is not responsible for the consequences of his/her act unless the risk of the injury sustained is reasonably foreseeable. The exact occurrence of the precise injuries need not to be foreseen, but the results of an act *must not be merely possible, but probable*. In terms of foreseeability, we are talking about reasonable foreseeability and not some sort of prophetic vision as to what might happen.

N.H. Civil Jury Instructions (1993) § 6.3 (emphasis added). This instruction also conflicts with the Section 435.

Under Texas law, a harm is foreseeable only if it is "a probable result of the act or omission, considering the interplay of natural forces and likely human intervention." *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 68 (5th Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

In Illinois, "foreseeability" means that which it is objectively reasonable to expect, not merely what might

conceivably occur. *Cunis v. Brennan*, 308 N.E.2d 617, 620 (Ill. 1974); *Benner v. Bell*, 602 N.E.2d 896, 899 (Ill. App. 4th Dist. 1992), *appeal denied*, 610 N.E.2d 1259 (Ill. 1993).

In Louisiana, "tort law no longer utilizes terms like proximate cause, foreseeability, and intervening act. Rather, [the Courts] have chosen to apply a duty-risk analysis in determining the extent of a party's liability." *Younger v. Marshall Indus., Inc.*, 618 So. 2d 866, 872-73 (La. 1993); *see Pierre v. Allstate Ins. Co.*, 242 So. 2d 821, 830 n.2 (La. 1971). Under Louisiana law, a jury must compare the risk of the defendant's conduct with the utility of that conduct--taking into consideration what was known about the gravity of any possible harm and the likelihood that such harm would occur. The negligence charge given in a factor concentrate case tried in 1993 in Louisiana state court trial

is set out below.[24] Obviously, the respondent court's planned

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[24] In *Cross v. Miles Inc.*, No. 91-9617 (Civ. Dist. Ct., Parish of Orleans, La.), the jury was charged as follows:

> [I]n order to prove negligence under the law, the plaintiff must prove two things by a preponderance of the evidence.
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> First, the plaintiff must prove that the defendant knew or should have known of the danger that hurt the plaintiff. This is the "knowledge of danger" requirement of proving negligence. If the defendant did not know of the danger at the time, you must ask yourselves whether the defendant should have known of the danger, and the question to ask yourselves there is whether a reasonably prudent person in the same or similar circumstances as the defendant would have had such knowledge at the time.
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> Second, in order to demonstrate that the defendant was negligent, the plaintiff also must prove that, at the time the plaintiff was injured, the defendant could have prevented or avoided the danger that caused the injury and that the defendant acted unreasonably in not doing so. This is the "unreasonable conduct" requirement of proving negligence. In determining whether the danger was preventable or avoidable, you should ask yourselves whether, at the time the plaintiff was injured, a reasonably prudent person in the same or similar circumstances as the defendant could have done anything to stop or minimize the risk.
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> Louisiana law further provides that you are to balance, or compare, the risk of the defendant's conduct against the utility of his conduct at the time of the plaintiff's injury in determining whether the defendant acted reasonably or unreasonably in not preventing or avoiding the danger. This balancing or comparison of risk and utility should be performed only in light of what the defendant knew or should have known about the risk at the time of the plaintiff's injury. The factors you may consider in balancing or comparing risk and utility are:
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> a. What was known about the gravity, or seriousness, of the danger at the time of the plaintiff's injury;
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> b. What was known about the probability, or likelihood, of the danger at the time of the plaintiff's injury;
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> c. The availability at that time of other, safer conduct that would have served the same purposes or satisfied the same needs as the suspect conduct; and
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> d. The usefulness, social good and utility of the defendant's conduct.

jury charge would not be adequate under Louisiana law.

California law requires that a jury be instructed that, in addition to foreseeability of harm from the allegedly negligent conduct, it must also find that the conduct "reasonably could have been avoided." Calif. Bar Assoc. Jury Instr. 3.1.

In Maryland, juries are instructed that "[a] reasonable person changes conduct according to the circumstances and the danger that is known or should be known. Therefore, if the foreseeable danger increases, a reasonable person acts more carefully." Maryland Civil Pattern Jury Instructions, 3d ed., No. 19:3. *See Doe v. Miles Labs., Inc.*, 927 F.2d 187, 195 (4th Cir. 1991) (holding, under Maryland law, that the risks relating to the use of Factor IX in September of 1983 "were not explicit enough to expect Miles to have known or foreseen them").

These examples clearly demonstrate that, while broad definitions of negligence may sound alike, when those definitions are placed in the context of each state's common law and the instructions which are given to that state's juries, the rules are substantively quite different. Under the precedents and sample instructions provided above, it is doubtful that plaintiffs' serendipity theory would give rise to a jury question in many states. Even if it did, the manner in which foreseeability is defined in state jury instructions could well produce different verdicts in different states. Plainly, where differences in state law may produce different outcomes, common issues do not predominate. *See* Fed. R. Civ. P. 23(b). This is such a case. The District Court committed a patent error in ignoring important variations in state law and in certifying a negligence issue class. *See Shutts*, 472 U.S. at 821-22 (due process requires analysis of the law of states interested in litigation). That error should be corrected by mandamus.

### 2. Different States Employ Different Standards of Care To Define a Defendant's Duty.

The District Court also erred by improperly minimizing another important difference in state negligence law. State negligence law is not uniform with regard to the standard of care which defines the duty of the fractionator defendants. Tab A at 15.

Some states impose a professional standard of care upon blood processors--*i.e.*, the reasonableness of their conduct is judged relative to that of other plasma collectors. *See* Tab A at 16-17. *E.g., Wilson v. Irwin Memorial Blood Bank*, 18 Cal. Rptr. 2d 517 (Cal. App. 1993), *review denied*, 1993 Cal. LEXIS 3759 (Cal. July 15, 1993); *Gibson v. Methodist Hosp.*, 822 S.W.2d 95 (Tex. Ct. App. 1991); *Seitzinger v. American Red Cross*, 1992 WL 361700 (E.D. Pa. 1992). Even those jurisdictions using a professional standard care do not interpret and apply that standard uniformly. For instance, in West Virginia, a plaintiff is entitled to challenge the adequacy of that standard. *Doe v. American Nat'l Red Cross*, 848 F. Supp. 1228, 1232-34 (S.D. W. Va. 1994). *See also Hoemke v. New York Blood Center*, 912 F.2d 550, 552 (2d Cir. 1990). Such challenges are not allowed under Ohio law. *Zaccone v. American Red Cross*, No. 1:92CV1341 (N.D. Ohio Apr. 18, 1994).[25] Some states look to national practices in establishing the standard of care; others look to local practices. *Compare McDaniel v. Hendrix*, 401 S.E.2d 260, 262 (Ga. 1991) (applies national standard of care); *Wickliffe v. Sunrise Hosp.*, 706 P.2d 1383, 1387 (Nev. 1985) (same), *with Hilden v. Ball*, 787 P.2d 1122, 1124 (Idaho 1989) (applies local standard of care); *Baylis v. Wilmington Medical*

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[25] In addition, several states, such as Pennsylvania, South Carolina, Connecticut, Maine, Oregon, and Iowa, have adopted the "two schools of thought" approach to negligence. In such states, if a professional standard of care is the governing law, a further instruction must be given that--if there are two accepted professional practices--it is not negligence to have followed one but not the other. *See generally* Prosser & Keeton, § 32 at 187.

*Center, Inc.*, 477 A.2d 1051, 1057 (Del. 1984) (same). In contrast, a few courts--including the respondent District Court in another case--have held that industry standards are irrelevant and that the fractionators owe plaintiffs a duty of ordinary care. *See* Tab A at 16-17.[26]

The District Court recognized that "the negligence law of the various states is not uniform in regard to the *duty* it imposes upon a defendant in cases of this kind." Tab A at 15. However, the Court held that this obstacle to class certification could be overcome by handing the jury at the class trial two verdict packets--one for the professional standard of care and one for the ordinary standard of care. *Id.* at 31.

The District Court's proposal does not solve the problem. First, it does not address the variations within the law governing the professional standard of care discussed above. Second, it ignores the vast differences in the evidence that would be introduced under the various standards. No jury will be able to evaluate fairly each of plaintiffs' negligence theories as applied to each of the four fractionator defendants at various points in time under two or more distinct legal standards for two different types of factor concentrates.[27]

The applicable standard of care is one of the fundamental issues in a negligence claim. *See* Prosser & Keeton, § 30 at 164.

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[26] Indeed, the District Court has criticized the "justifications" for use of the professional standard of care as "unpersuasive," Tab A at 17, notwithstanding that the Court, sitting in diversity, must apply the substantive law of the various states as it exists and not as the Court would prefer it to be.

[27] Indeed, presenting the evidence applicable to all of the different standards of care to a single jury could cause additional problems. For instance, most evidence relating to the ordinary standard of care would be irrelevant under the professional standard. The presentation of such evidence to a jury evaluating defendants' conduct under the professional standard would be unfairly prejudicial.

Because the standard is not applied uniformly, the District Court erred in certifying a negligence class.[28]

### 3. States Where Claims Arise Have a Strong Interest in Applying their Own Law to Resolve Those Claims.

States have a particularly strong interest in applying their own law to the issues in this litigation because those issues involve important matters of public policy.[29] Nearly all states have enacted blood shield statutes in order to assure the public of an adequate supply of blood and blood derivatives--including

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[28] Other differences in state law also make certification inappropriate. In *Poole*, the District Court ruled that plaintiffs were entitled to an instruction that the fractionators could be held negligent for failure to warn the plaintiff directly. In contrast, in *Walls v. Armour Pharmaceutical Co.*, No. 89-1705-CIV-T-23B (M.D. Fla.), tried in Florida in January 1993, the court instructed the jury that "Armour had no duty to provide any warning directly to [the plaintiffs]." *See generally* ABA Products Liability Committee Section of Litigation, *State-by-State* Summary of the learned Intermediary Doctrine as a Springboard for Summary Judgment (July 1993).

Differences in evidentiary standards also preclude a class trial as to certain issues. With respect to plaintiffs' inadequate warning claim, the jury would have to be instructed that, as to New Jersey plaintiffs, the warning is presumed adequate upon approval by the FDA. N.J. Stat. Ann. § 2A:58C-4; *Hammock v. Hoffman-LaRoche, Inc.*, 635 A.2d 533, 535 (N.J. App. 1993). In other states, FDA approval may only be evidence of adequacy. Similarly, with regard to plaintiffs' claim that the fractionators "fail[ed] to properly comply with applicable federal statutes," App. 57, proof of such a failure could be deemed negligence *per se* in some states, but merely nonconclusive evidence of negligence in others. *Compare Missouri Pac. R.R. Co. v. American Statesman*, 552 S.W.2d 99, 102-03 (Tex. 1977) (violation of a statute held negligence *per se*) *with Waterson v. General Motors Corp.*, 544 A.2d 357, 369-70 (N.J. Sup. Ct. 1988) (violation of statute not negligence *per se*).

[29] In Illinois and in many other jurisdictions, the court must consider state public policy to determine the existence or scope of duty. *See, e.g., Lenox, Inc. v. Triangle Auto Alarm*, 738 F. Supp. 262, 268 (N.D. Ill. 1990); *Bean v. BIC Corp.*, 597 So. 2d 1350, 1352 (Ala. 1992); *Mullin v. City of South Bend*, 1994 WL 445693 at *4 (Ind. Aug. 19, 1994); *Cameron v. Pepin*, 610 A.2d 279, 282 (Me. 1992); *Southland Corp. v. Griffith*, 633 A.2d 84, 88 (Md. 1993); *Doe v. Johnson*, 817 F. Supp. 1382, 1387 (W.D. Mich. 1993); *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1116 (N.J. 1993).

factor concentrates processed by defendants.[30] These statutes generally bar actions based on strict product liability and breach of warranty, but not those based on negligence.[31]

The blood shield statutes nevertheless are quite relevant to this case. Plaintiffs' principal theory is that the fractionator defendants should be held liable for harm caused by all "known and unknown viruses" transmitted through the factor concentrates. Tab A at 19. While plaintiffs have styled this a

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[30] *See, e.g., Cutler v. Graduate Hosp.*, 717 F. Supp. 338, 340 (E.D. Pa. 1989) ("The general purpose and policy evident in the statute was to protect the system by which blood products are made available for use by hospitals for both emergency and routine uses. The onslaught of the AIDS virus has, if anything, made this purpose more significant"); *Doe v. Travenol Labs. Inc.*, 698 F. Supp. 780, 784 (D. Minn. 1988) ("Hemophiliacs . . . depend on the availability of Factor VIII concentrate which has lengthened and improved the quality of their lives. Because the market for these products is small, their availability would be threatened if the cost of the inherent risk of HIV infection were imposed on the manufacturer") (footnote omitted).

[31] Ala. Code § 7-2-314(4); Alaska Stat. § 45.02.316(e); Ariz. Rev. Stat. Ann. §§ 12-561, 12-563, 32-1481, 36-1151; Ark. Code Ann. §§ 4-1-316(3)(d)(i), 20-9-801, 20-9-802; Cal. Health & Safety Code § 1606; Colo. Rev. Stat. § 13-22-104; Conn. Gen. Stat. § 19a-280; Del. Code Ann. tit. 6, § 2-316(5); Fla. Stat. § 672.316(5); Ga. Code Ann. §§ 11-2-316(5), 51-1-28(a); Haw. Rev. Stat. §§ 325-91, 327-51; Idaho Code § 39-3702; 745 Ill. Comp. Stat. Ann. ch. 745, § 40/2; Ind. Code § 16-41-12-11(a); Iowa Code § 142A.8; Kan. Stat. Ann. § 65-3701; Ky. Rev. Stat. Ann. § 39.125; La. Rev. Stat. Ann. § 9:2797 and La. Civ. Code Ann. art. 2322.1; Me. Rev. Stat. Ann. tit. 11 § 2-108; Md. Code Ann., Cts. & Jud. Proc. § 5-373; Mass. Gen. L. ch. 106, § 2-316(5); Mich. Comp. Laws. § 333.9121; Minn. Stat. § 529.221(e); Miss. Code Ann. § 41-41-1; Mo. Ann. Stat. § 431,069; Mont. Code Ann. § 50-33-102 to 104; Neb. Rev. Stat. §§ 71-4001, 71-4809, 71-4810; Nev. Rev. Stat. § 460.010; N.H. Rev. Stat. Ann. § 507:8-b; N.M. Stat. Ann. § 24-10-5; N.Y. Pub. Health Law § 580(4); N.C. Gen. Stat. § 130A-410; N.D. Cent. Code §§ 41-02-33(3)(d), 43-17-40; Ohio Rev. Code Ann. § 2108.11; Okla. Stat. tit. 63, § 2151; Or. Rev. Stat. § 97.300; 42 Pa. Cons. Stat. Ann. § 8333; R.I. Gen. Laws § 23-17-30; S.C. Code Ann. § 44-43-10; S.D. Cod. Laws. Ann. § 57A-2-315.1; Tenn. Code Ann. § 47-2-316(5); Tex. Civ. Prac. & Rem. Code Ann. § 77.001-.004 and Tex. Bus. & Com. Code Ann. § 2.316(e); Utah Code Ann. § 26-31-1; Va. Code Ann. § 32.1-297; Wash. Rev. Code § 70.54.120; W. Va. Code § 16-23-1; Wis. Stat. § 146.31; Wyo. Stat. §§ 34.1- 2-316 (c)(iv), 35-5-110).

"negligence" claim, it clearly flirts with strict liability. States that have barred strict liability actions against fractionators will be disinclined to interpret foreseeability and duty of care so as to undercut the goals of the blood shield statutes. By attempting to impose a new national negligence law that effectively blurs the distinction between negligence and strict liability, the District Court is also improperly depriving states of the right to control the development of this important principle of tort law in accordance with their own public policy views. *See Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 424 (D.C. Cir. 1988).

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In sum, the District Court has disregarded state law in order to justify certifying a nationwide class. The "general rules" invoked by the Court do not exist. Moreover, those "rules" may change the outcome of this litigation. The Court's decision ignores the predominance requirement of Rule 23(b)(3) and violates *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), by attempting to impose a national common law, rather than looking to the state law applicable to class members' claims.

Mandamus is the appropriate remedy when a District Court acts outside the scope of its authority. *J.H. Cohn & Co. v. American Appraisal Assocs., Inc.*, 628 F.2d 994, 997 (7th Cir. 1980). *See Will v. United States*, 389 U.S. 90, 105-06 (1967). On that basis, the writ should issue in this case.

### B. The Class Should Not Have Been Certified Because A Class Action Is Not Superior to Other Methods For the Fair and Efficient Adjudication of This Controversy.

Mandamus should also issue because class litigation is not "superior to other available methods for the fair and efficient adjudication" of this controversy. Fed. R. Civ. P. 23(b)(3). The class trial planned by the Court will be unmanageable. It will not advance the resolution of these cases. In fact, the class trial will produce additional litigation.

### 1. The Class Trial Will Be Unmanageable.

A few simple arithmetic calculations show that this case is careening toward an unmanageable class trial. Plaintiffs have already asserted at least ten different theories of negligence against each of the four fractionator defendants. *See* App. 55-57. Each of the fractionators used its own methods for gathering and processing plasma factor concentrates. In some cases, those methods changed over time. Each fractionator processed Factor VIII and Factor IX concentrates. Each fractionator developed and implemented heat treating of their concentrates at different times. Each had various interactions with federal regulators regarding their concentrates and the manner in which those concentrates were labeled. Evidence will have to be introduced on each of these points.

The Court proposes submitting each of plaintiffs' negligence theories to the jury through a special verdict form that will provide for specific findings regarding the "negligence" of each defendant on each theory for each factor concentrate, with a finding as to when (if ever) such "negligence" occurred. *See* Tab A at 30-34. In addition, the jury will be asked to decide each issue under two different standards of care: ordinary care and professional care.

The jury interrogatory and verdict forms will be thicker than some books. Jurors will be asked to respond to several hundred specific questions regarding the alleged negligence of the fractionator defendants.[32] That number will increase many times

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[32] The number of jury questions relating to the fractionator defendants is based on the following formula:

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| 10-15 | Acts of negligence alleged in complaint |
| 2 | Number of findings per theory (was the defendant negligent? as of what date?) |
| 4 | Number of fractionator defendants |
| 2 | Number of blood factor concentrates |
| X 2 | Number of applicable standards of care |
| 320480 | MINIMUM NUMBER OF JURY INTERROGATORIES |

over if additional forms are added to accommodate differences in state negligence law. Moreover, the jury will be required to answer yet another set of interrogatories regarding plaintiffs' claims against the NHF for breach of fiduciary duty. If the jury does find negligence, dates will have to be attached to each act of negligence.

No jury of mortals will be able to keep track of the instructions or the evidence--much of which will be technical in nature--relevant to each defendant and each issue. *See In re Tetracycline Cases*, 107 F.R.D. 719, 733 (W.D. Mo. 1985).

**2. The Class Trial Will Not Materially Advance the Litigation.**

When the class trial is over, plaintiffs' claims will be no closer to resolution than they are now. The proposed class trial will not result in a determination of liability. Rather, after the class negligence issue trial, a series of individual trials would follow in separate lawsuits by each class member. *See Doe v. Guardian Life Ins. Co.*, 145 F.R.D. 466, 476 (N.D. Ill. 1992) (denying class certification on this ground). *See supra* note 1.

To dispose of those negligence issues included in the class proceedings, trial courts around the country will be required to resolve questions regarding the statute of limitations,[33] causation-

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[33] Many Phase Two lawsuits will be dismissed under the applicable statute of limitations. Most class members were infected by the end of 1982 and knew that they were HIV-positive by 1985 or 1986. *See, e.g.*, App. 70 ¶ 7.1. Thus, their claims were time-barred before *Wadleigh* was filed in October of 1993. Moreover, it is unclear whether the pendency of *Wadleigh* will toll the statute of limitations for other class members. That question will be decided by the individual trial courts applying state statutes of limitations and tolling principles. *See Wilkinson v. Paine, Webber, Jackson & Curtis, Inc.*, 585 F. Supp. 23, 28 (N.D. Ga. 1983) ("federal equitable tolling principles do not apply to a claim that arises solely out of state law").

in-fact,[34] and proximate cause. In addition, the Phase 2 courts will be required to try any causes of action that were not included in the class trial. These potentially include additional negligence claims asserted by plaintiffs, as well as any strict liability, warranty, and other causes of action, including cross claims between the fractionators.

Resolution of those issues will not, however, dispose of plaintiffs' claims. Plaintiffs have also named as defendants physicians, hospitals, blood processors, and others who are not parties to the class proceedings. It will be necessary to introduce evidence from the class trial in each of the local proceedings to determine whether these parties are liable.

Introduction of evidence from the class trial will also be necessary to establish the comparative negligence (or assumption of risk) of the plaintiffs and the proportionate fault of each tortfeasor.[35] A second jury will be unable to make an adequate determination of comparative negligence by considering only an abstract finding of an earlier jury that one of more defendants' conduct was "negligent" (or alternatively that the defendant's conduct was *not* negligent in a claim by a physician who is not a party of class proceedings); the only way to determine

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[34] Many persons with AIDS and hemophilia have been exposed to risk factors for AIDS other than factor concentrates. These risk factors include other blood therapies used to treat hemophilia. *See, e.g.*, App. 184 (over 31% of adults and adolescents with AIDS and hemophilia had one or more additional risk factors).

[35] For purposes of a comparative negligence defense, a plaintiff could be considered responsible for his use of factor concentrates if he knew that the concentrates might transmit HIV but nevertheless continued to take them to treat his hemophilia. In some jurisdictions, this argument might be raised as an affirmative defense of assumption of risk. Examples of a plaintiff's possible negligence include taking concentrate after the expiration date, taking concentrate prescribed for a different person, or sharing needles for infusion. Comparative negligence for a physician might include failure to notify a patient of a recall, failure to notify a patient of his HIV-positive status (thus delaying treatment or potentially exposing sexual partners), failure to advise of treatment alternatives, or failure to treat in accordance with the applicable standard of care.

comparative negligence is to compare. *See C.W. Reagan Inc. v. Parsons, Brinckerhoff, Quade & Douglas*, 411 F.2d 1379, 1388 (4th Cir. 1969).[36]

Thus, the supposed benefits of class certification--avoiding repetition of evidence and shortening individual trials--will not be accomplished through certification of a negligence issue class. The evidence relating to the "common" issue the District Court proposes to resolve will necessarily be repeated in large part to adjudicate the individual class members' claims. In these circumstances, instead of reducing the burden on the litigants and the judicial system, a class action will increase that burden by producing an unnecessary unmanageably cumbersome trial. When a class trial "is likely to duplicate effort rather than save it," a class should not be certified because it would not be a

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[36] *Accord In re Tetracycline Cases*, 107 F.R.D. at 734 ("allocation of fault could not . . . be fairly adjudicated in any subsequent 'individual' trial without a full replay of the evidence related to the defendant manufacturer's state of knowledge at the time in question"). In *Davenport ex rel. Fowlkes v. Gerber Products Co.*, the court noted:

> Even if the class were certified on the duty to warn and breach of duty issues, individual issues relating to each parent's knowledge of the risks and other possible causes for the infant's injury would remain unresolved. The jury in every individual trial would have to examine the knowledge of the defendant manufacturer and weigh the fault of the juice manufacturer and any other potential wrongdoer such as the child's physician. In addition, the comparative fault of the parents would need to be weighed on an individual basis. In sum, certification on the narrow legal issue presented by plaintiffs does not advance this litigation in light of the fact that virtually all of the issues related to liability would remain unresolved on an individual basis.

125 F.R.D. 116, 120 (E.D. Pa. 1989) (denying class certification in a case alleging that defendants failed to warn of the danger to infants of "nursing bottle syndrome"). *See also State v. Kaatz*, 572 P.2d 775, 785 (Alaska 1977) ("The jury which apportions the negligence must hear all the evidence on liability"); *Metropolitan Dade County v. Cox*, 453 So. 2d 1171, 1173 (Fla. Dist. Ct. App. 1984) (jury cannot apportion negligence "without complete information as to the quantity, quality, nature and degree of the defendant's conduct so that the jury knows just what to 'compare' with its assessment of the plaintiff's").

superior method for adjudication of the controversy. *Payton v. Abbott Labs.*, 100 F.R.D. 336, 339 (D. Mass. 1983).

### 3. The Class Trial Will Give Rise to Additional Litigation Regarding the Class Trial's Preclusive Effect--If Any.

Finally, the class trial is not a superior means of resolving this litigation because it is far from clear the class verdict would have any preclusive effect in the subsequent individual trials of class members.

A finding of "negligence" in the class trial would not result in a judgment against any of the defendants. Before a judgment could be rendered, another court (most likely in another jurisdiction), would have to adjudicate several other dispositive issues. Only if all of these issues were resolved in favor of a particular plaintiff could a judgment be entered against any defendant. Until that happens, a class determination of negligence would be nothing more than an advisory opinion, to which no court (to defendants' knowledge) has given preclusive effect in another proceeding. *See Bieneman v. Chicago*, 864 F.2d 463, 465 (7th Cir. 1988) ("A class limited to legal claims . . . , leaving the class members to file separate suits if they want to take advantage of the ruling, does not resolve any concrete case, and it looks suspiciously like a request for an advisory opinion"), *cert. denied*, 490 U.S. 1080 (1989).

Moreover, issue preclusion would not apply unless the party against whom preclusion is sought had an opportunity to appeal the issue in the original proceeding. Restatement (Second) Judgments § 28(1). Without a right of appeal, the party against whom preclusion is sought does not have a "full and fair opportunity to litigate" the issue. *Gray v. Lacke*, 885 F.2d 399, 406 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990). Although the fractionator defendants would certainly try to appeal any adverse finding immediately, it is possible that this Court will consider a jury finding of "negligence" to be a nonappealable interlocutory order because it will not constitute

a judgment of liability against any of the defendants. *See In re 949 Erie St.*, 824 F.2d 538, 541 (7th Cir. 1987) (collateral estoppel does not apply to nonappealable interlocutory orders).[37] In such circumstances, other courts could not give preclusive effect to any determination of negligence by the jury in the class trial.[38]

Even if the jury finds in favor of the defendants, the class trial may not prevent members of the purported class from suing the fractionators for negligence. The respondent Court plans to try some--but not all--of the negligence claims that may be

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[37] If the outcome of the class trial is appealable, it will be this Court's responsibility to determine whether, as to each separate act of alleged negligence, the District Court's charge conformed to the law of each of 51 jurisdictions, as well as to determine whether the District Court erred in other rulings.

[38] Moreover, state-by-state differences in evidentiary standards may defeat issue preclusion. 18 Wright & Miller, *Federal Practice and Procedure*, § 4422 at 215 (issue preclusion also may be defeated by substantial differences in the admissibility of evidence). Thus, the class "issue" trial verdict will not be binding in the individual trials unless the District Court correctly instructs the jury on the different substantive evidentiary standards of each state, such as the effect of presumptions under each state's law.

The preclusive effect of any judgment reached by the class trial may also be called into question as a result of the discovery restrictions imposed by the District Court. *See* App. 84-86. One of the primary considerations in deciding the application of collateral estoppel is whether the party against whom collateral estoppel is being invoked had a "full and fair" opportunity to litigate his claims in the prior action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 (1979). That includes the ability to engage in "full scale discovery." *Id.* at 331 n.15. The *Parklane* Court cautioned that, "differences in available procedures may sometimes justify not allowing a prior judgment to have estoppel effect in a subsequent action even between the same parties, or where defensive estoppel is asserted against a plaintiff who has litigated and lost." *Id. See West v. Ruff*, 961 F.2d 1064, 1065-66 (2d Cir. 1992) (plaintiff's lack of discovery precluded a full and fair opportunity to litigate and "collateral estoppel is inappropriate"); *Sprecher v. Graber*, 716 F.2d 968, 972 (2d Cir. 1983) ("substantially disparate opportunities for discovery" preclude collateral estoppel unless these differences wouldn't affect the outcome); *Minsky v. General Accident Ins. Co.*, 1993 WL 381702, *2 (N.D. Cal.) (issue not barred by issue preclusion where plaintiff's discovery was lacking and new discovery opportunities are available).

raised by class members. App. 91-97. Plaintiffs may therefore attempt to assert additional negligence claims against the fractionators in subsequent proceedings. Phase 2 courts will be left to determine whether such claims are barred.

Further, absent class members will likely argue that they are not bound by a defense verdict in the class trial. Many will argue that they did not receive notice of the proceedings--and therefore did not have an opportunity to opt out of the class. These claims will be difficult to defend because neither the Court nor the parties will have a list of the persons to whom notice was mailed. The notice plan authorized by the District Court depends entirely upon third parties and upon publication through a single newspaper and through computer bulletin boards.

Absent class members may also contend that their interests were not adequately represented in the class action. Without a class representative for each particular claim, and without class counsel "representing" each kind of claim in each state, absent class members may contend there was not adequate representation as to the individual state law questions which, as noted above, the Court must determine on a state-by-state basis. *See Ikonen v. Hertz Mountain Corp.*, 122 F.R.D. 258, 265 (S.D. Cal. 1988) ("The law of each state would still need to be separately analyzed and applied to each class member"). Thus, in each subsequent case defendants will be forced to relitigate the issue of whether the jury was properly charged on duty, foreseeability, and other provisions of the substantive law of the applicable state.

* * *

The District Court concluded that a class trial was the superior means of proceeding with this case because "[a]ll defendants have to offer is a succession of separate trials in the various jurisdictions, litigating over and over again the same questions . . . ." Tab A at 35. Historically, however, this litigation has by no means been unmanageable or even difficult

to deal with on a case-by-case basis.[39] Cases have been dismissed on motion; cases have been settled; and cases have been tried--in nearly all instances to defense verdicts. There is no reason to believe that this will be any different if these cases are allowed to proceed on their normal course.[40]

The District Court's limited-issue certification order will not shorten or simplify these individual trials. Instead it will give rise to an unmanageable class trial and protracted litigation concerning the legal effect (if any) and appealability of the class "issue" verdict. In short, the proposed class trial is a grossly inferior means of resolving plaintiffs' claims. Accordingly, this Court should issue a writ of mandamus directing the District Court to withdraw its certification order.

## II. MANDAMUS SHOULD ISSUE BECAUSE THE FRACTIONATOR DEFENDANTS WILL BE IRREPARABLY INJURED IF THEY ARE NOT GRANTED IMMEDIATE RELIEF FROM THE DISTRICT COURT'S ERRONEOUS CLASS CERTIFICATION ORDER.

This Court should not wait until a final judgment has been entered in this case to correct the District Court's error. It is far from clear when--if ever--these proceedings will produce an appealable judgment. *Bieneman v. Chicago,* 864 F.2d 463, 465 (7th Cir. 1988), *cert. denied,* 490 U.S. 1080 (1989) (verdict may only be advisory). In the meantime, the fractionator defendants and the courts will be burdened with collateral litigation of

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[39] In the nine years since the first such case was filed (1985), this litigation has by no means created any sort of crisis for the judicial system. Indeed, as noted above, two-thirds of the cases were filed by *Wadleigh* class counsel *after* they filed the present class action complaint.

[40] Indeed, the vast majority of individual claims appear to be susceptible to motions for summary judgment based upon the running of applicable state statutes of limitation.

issues generated by the District Court's error in this case. Mandamus should issue now to avert the following problems:

*First*, District Court errors related to the class trial will not be easy to fix because the class verdict may not be immediately appealable. The negligence issue trial will not produce a final judgment in any traditional sense. If the jury finds for plaintiffs, issues of liability and damages will remain unresolved. Fractionator defendants would attempt to appeal an adverse verdict to this Court, but such an appeal might be denied on the ground that it was interlocutory.

If appeal were denied, the fractionator defendants would be compelled to challenge the findings of the negligence issue jury at the trial of each of the individual plaintiffs. Dozens of appeals--to various state appellate courts and federal circuit courts of appeal--would be necessary. This extra litigation burden constitutes an "extraordinary inconvenience" warranting the issuance of mandamus. *Maloney*, 854 F.2d at 154.

*Second,* whether they win or lose at the class trial, defendants will be burdened with ongoing litigation regarding the effect of the verdict. *See supra,* at Part I(B)(3). That will be the case even if this Court reviews and affirms the verdict of the class trial. Preclusive effect must be resolved in light of state substantive law. *See* 7B Wright & Miller, *Federal Practice and Procedure*, § 1789, at 245 ("[T]he court adjudicating a [class action] dispute cannot predetermine the res judicata effect of its own judgment; that can be tested only in a subsequent suit"). Therefore, such issues will be litigated in the lawsuits of each of the individual plaintiffs.

*Third*, the structure of the class trial sets the stage for constitutional error at the individual trials. If any of the District Courts actually give preclusive effect to a pro-plaintiff verdict from the class trial, defendants' right to trial by jury will be violated.

The Seventh Amendment forbids the splitting of different parts of a controversy for resolution by separate federal court

juries where the issues are interwoven. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). *See Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) ("Inherent in the Seventh Amendment is the general right of a litigant to have only one jury pass on a common issue of fact"). *See also McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir. 1993); *C. W. Regan, Inc. v. Parsons, Brinckerhoff, Quade & Douglas*, 411 F.2d 1379, 1388 (4th Cir. 1969); *In re Industrial Gas Antitrust Litig.*, 100 F.R.D. 280, 303 (N.D. Ill. 1983). Separate juries may decide separate issues in a controversy *only* if those issues are "so distinct and separable" from each other that separate trials may be conducted "without injustice." *Gasoline Products*, 283 U.S. at 500.

Issues that the District Court plans to try on a classwide basis are inextricably interwoven with issues that must be addressed in the individual Phase 2 trials. In particular, the issues of defendants' negligence and the comparative negligence of other defendants or of an individual plaintiff could not be submitted to two separate juries "without confusion and uncertainty, which would amount to a denial of a fair trial." *Gasoline Products*, 283 U.S. at 500. *See Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc.*, 513 F.2d 407 (D.C. Cir. 1975) (where question of damages--dependent in part on the comparative negligence of the plaintiff--is so intertwined with that of the defendant's negligence that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, a separation would amount to a denial of a fair trial); *United Air Lines, Inc. v. Wiener*, 286 F.2d 302 (9th Cir.) (same), *cert. denied*, 366 U.S. 924 (1961).[41]

If the negligence issue class trial goes forward, the fractionator defendants will be compelled to fight this Seventh

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[41] A similar problem will arise with regard to the issue of foreseeability. Under the law of some states, the findings of the "issue" class jury regarding foreseeability vis-a-vis defendants' alleged breach of duty may be inconsistent with the findings of the individual Phase 2 juries regarding foreseeability vis-a-vis proximate causation.

Amendment battle in each of the individual successor trials. Similar problems may arise under state constitutions. Mandamus should issue to prevent such unnecessary litigation.

*Finally,* the fractionator defendants will be irreparably injured even if they "win" the class trial or prevail on appeal to this Court. The class negligence issue trial will delay discovery and adjudication of all MDL cases and many state court cases as well. As the health of plaintiffs deteriorates over time, the fractionator defendants will lose their right to depose plaintiffs regarding applicable defenses and--if necessary--to cross-examine plaintiffs at trial.[42]

## CONCLUSION

The District Court is prepared to embark on a process that will complicate--rather than simplify--this litigation. The Court's certification of a negligence "issue" class violates Rule 23, the *Erie* doctrine, and due process. The proposed class trial will be unmanageable. More importantly, it will delay the ultimate resolution of these cases and multiply the complexity of the subsequent individual trials. This Court should act now--before the fractionator defendants are irreparably harmed and the courts are burdened with unnecessary problems related to this litigation. For these reasons, the fractionator defendants respectfully request the Court to issue a writ of mandamus directing the District Court to vacate its class certification order.

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[42] The District Court has stayed most MDL discovery pending the outcome of the class "negligence issue" trial. *See* App. 84-86. This discovery stay will delay state court proceedings as well. Orders have been entered in a number of jurisdictions coordinating state court litigation with the federal MDL proceedings.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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No. 94-3912

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IN THE MATTER OF:

RHONE-POULENC RORER INCORPORATED,
ARMOUR PHARMACEUTICAL CORPORATION,
MILES INCORPORATED,
BAXTER HEALTHCARE CORPORATION,
ALPHA THERAPEUTIC CORPORATION,

Petitioners

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**RESPONSE TO PETITION FOR A WRIT OF MANDAMUS**

---

JONATHAN WADLEIGH and JOANNE WADLEIGH, h/w; DANA KUHN; THOMAS FAHEY and FRANCES FAHEY, h/w; JOSEPH WALKER and RACHEL WALKER, Parents and Natural Guardians of MITCHELL WALKER, a minor; WALTER ERICKSON and MARIA ERICKSON, h/w; SUSAN COLLINS, Personal Representative of the Estate of her husband ROBERT COLLINS, deceased; JACK STEVENS and LINDA STEVENS, Parents and Natural Guardians of JEFFREY STEVENS; LARRY BURR and JUANITA BURR, h/w , Natural Parents and Personal Representatives of the Estate of MICHAEL RYAN BURR, Deceased; SAMUEL THOMAS and JOANNE THOMAS, Administrators of the Estate of MATTHEW THOMAS, deceased; CHARLES TURNER and CONSTANCE TURNER, Parents and Natural Guardians of CHRISTOPHER

TURNER a minor; LINDA LEWIS and JERRY L. LEWIS, Parents and Natural Guardians of JERRY GRANT LEWIS, a minor; and MARTHA DOUGHERTY, Guardian *Ad Litem* of TIMOTHY DOUGHERTY, a minor, on behalf of themselves and for all others similarly situated,

Respondents

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# I.
# BACKGROUND, PROCEDURAL HISTORY AND COUNTERSTATEMENT OF THE CASE

## A. Background

The complaint in this case alleges that four defendant manufacturers made and distributed blood-clotting products to persons with hemophilia (Factors VIII and IX, together referred to as AHF or Factor Concentrates); that due to defendants' negligence their Factor Concentrates were contaminated with the Human Immunodeficiency Virus ("HIV"); and that, as a result, those who used Factor Concentrates were infected with HIV and many now have Acquired Immune Deficiency Syndrome ("AIDS"). Thousands who used defendants' contaminated products have died of AIDS. Many thousands of others are HIV positive and at risk. The lawsuit alleges claims sounding in negligence, strict liability, breach of fiduciary duty (against the National Hemophilia Foundation, which has not joined in the petition), and concert of action.

In one case tried to a jury verdict, one of the defendants herein (Armour Pharmaceutical Co.) was held liable in negligence for the death of a child who used Armour's contaminated AHF and died of AIDS at age 11. *Walls v. Armour Pharmaceutical Co.*, 832 F. Supp. 1467 and 1505 (M.D. Fla. 1993):

> First, the jury found and the court agrees that in 1982-83 Armour was or should have been aware from reasonable and available evidence of a potential risk of acquiring AIDS from contaminated blood or blood products. Plaintiff presented considerable expert testimony in support of her claim that Armour's duty to warn of the AIDS risk associated with Factor VIII concentrate arose at an earlier time than Armour acted. This evidence took the form of oral testimony and of exhibits including both Armour's own internal documents and technical

> articles published in medical journals. The matter was contested and went to the jury. *By its interrogatory verdict, the jury specifically found, from the greater weight of the evidence, that Armour was negligent in failing to warn prescribing physicians in a timely or an effective manner of a potential AIDS risk associated with its Factor VIII concentrate product.*

832 F. Supp. at 1481-82 (emphasis supplied). The district judge in that case further found that *federal* regulations imposed a duty upon Armour through a "comprehensive framework of federal law" that was "applicable to Armour's product Factor VIII concentrate" and that "pharmaceutical companies are bound by federal law to fulfill this duty." 832 F. Supp. at 1484.[1]

Defendants' petition is grounded on demonstrably erroneous assertions, including--that Judge Grady (1) "ignored" differences in state law which, in fact, he carefully considered and thoughtfully examined in his class certification Opinion; and (2) that he intends to apply a uniform national negligence standard, where he expressly ruled to the contrary. From these incorrect assertions defendants create a tale of confusion and unmanageability. Judge Grady, however, after considering the lengthy briefs, seven in all, on class certification, concluded *for purposes of class certification* "that the definition of negligence [was] substantially the same throughout the country", Ex. A to Defendants' petition at 30, not that he would create and then apply a federal negligence standard. In doing so, he agreed with the conclusions reached by other courts.

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[1] The *Walls* case is barely acknowledged in defendants' present petition (petition p. 31 note 28), and its citation in the Federal Supplement is not given, although it involved the same counsel and same defendant that filed the petition. *Walls* is on appeal to the Eleventh Circuit. Further, defendants' petition only makes fleeting mention of the numerous settlements already achieved.

**B. The Wadleigh Case**

The lawsuit from which the mandamus petition originates is *Wadleigh, et al. v. Rhone-Poulenc Rorer, Inc., et al.*, 93 C 5969 (N.D. Ill.), filed in the Northern District of Illinois, and assigned to the Honorable John F. Grady, n inal respondent. The *Wadleigh* class action has been consolidated with over 100 cases subsequently transferred to the Northern District by the Judicial Panel on Multidistrict Litigation, designated as MDL-986.

In transferring the cases to Judge Grady, the Multidistrict Panel found that there were "common questions of fact" among similar blood-factor contamination cases that were then pending in federal courts in Florida, New Jersey, New York, and Illinois. *In Re "Factor VIII or IX Concentrate Blood Products" Prods. Liab. Litig.*, 853 F. Supp. 454 (J.P.M.L. 1993).

Judge Grady earlier presided over the jury trial of *Poole v. Alpha Therapeutic Corp., et al.*, similar to the instant case, involving the same four manufacturer defendants as *Wadleigh*. His experience in trying that case provided him with insight and background which he repeatedly referred to in his class certification decision. In *Poole*, the jury found none of the defendants to be negligent. After the trial, counsel for defendant Armour, in response to a question from Judge Grady in this case, conceded that had *Poole* been a class action, all class members would have been bound by the judgment in favor of defendants, effectively terminating this litigation. (Res.App. A).[2]

On September 30, 1993, the *Wadleigh* class action was filed on behalf of up to 10,000 persons with hemophilia who were infected with HIV from the four manufacturer defendants' Factor Concentrates. More than 2,500 class members have died, a toll which increases daily, there being no known cure for either HIV infection or AIDS.

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[2] Respondents' Appendix is referred to as "Res.App."

The litigation has moved forward under Judge Grady's stewardship. In a memorandum opinion issued on August 17, 1994, Judge Grady certified a class on the issues of negligence and breach of fiduciary duty (the latter against the defendant National Hemophilia Foundation). Multiple pretrial orders have been issued. Multiple hearings and phone conferences have taken place. Extensive pretrial discovery has been ongoing on behalf of all parties. Numerous pretrial discovery disputes among the parties have largely been resolved. Firm discovery deadlines are in place. A trial date has been established - within 10 months (October, 1995). Literally tens of thousands of documents have been analyzed and organized within plaintiffs' document depository established pursuant to court order. More than one hundred deposition transcripts have been collected for use in the pending litigation. Expert witnesses have been retained. Most recently, after extensive briefing, negotiations among the parties, and court hearings on the subject, a form of notice to potential class members has largely been agreed upon, with a final form of notice to be approved by the court and mailed to potential class members soon.

And now, midstream in the litigation and four months after the district court's opinion certifying the negligence and breach of fiduciary duty issues, there has been filed a petition for a Writ of Mandamus, seeking to decertify the class.

Defendants point to the fact that including actions pending in the state courts, there are several hundred individual cases which have been filed among the thousands of potential claims that could have been filed. They point to the fact that with a single exception, to which scant reference is made in their brief, all of these individual cases have resulted in defense verdicts.

The reasons for the disparity between the number of victims of the AIDS epidemic in the hemophilia community and the number of court filings is to be found in the allegations in plaintiffs' complaint. There exists here a variable unique to this litigation and many times discussed on the record by all counsel in the context of framing a proper form of class notice - the

issues of privacy and confidentiality, and in part, the fact that many members of the hemophilia community may not be aware of their ability to participate without compromise of privacy considerations. Nor do defendants follow the apparent logic of their position. Defendants disparage the merits of plaintiffs' claims. If the merits of plaintiffs' claims are so very weak, the quickest vehicle for dispatching in one fell swoop just about all of these claims would be to agree to a class action resolution on the threshold negligence issue which would decisively terminate defendants' exposure and avoid the extraordinary high costs in the aggregate of defending hundreds of individual claims.

In this fashion, the defendants argue too much. Defendants, if confident of their assessment of the substantive merits of their position, would wish to seize advantage of the class certification offered by the court below and resolve this litigation on a reasonably prompt basis, once and for all. Rather, defendants, ironically, propose to proceed with almost endless litigation of individual claims which predictably will carry into the next century.

### C. The Allegations of the Wadleigh Complaint

Plaintiffs in *Wadleigh* allege that the defendant manufacturers had a duty in the 1970s to reduce or eliminate the viral contamination of their products. That duty, plaintiffs allege, arose from the nature of the product itself. Factor Concentrates are derived from pooled plasma from thousands of "paid" donors, many of whom were at high risk for viral infection. As a matter of rudimentary virology, defendants knew that their products were subject to contamination by new viruses. Plaintiffs' claim that if the manufacturer defendants had taken reasonable steps to reduce or eliminate viral contamination of their products, the risk of HIV infection would have been reduced substantially if not eliminated. The technology for viral inactivation through heat treatment existed in the early 1970s. As early as 1980, a German manufacturer had implemented an effective viral inactivation process that inactivated both hepatitis and, as it turned out, HIV.

Plaintiffs also allege that by July, 1982, at the latest, the manufacturer defendants knew or should have known that many plasma donors were within high risk profiles for AIDS. By at least December, 1982, the manufacturer defendants were informed or became aware that the working hypothesis of the Centers for Disease Control was that the causative agent of AIDS was viral, likely blood borne, and was following the same pattern of contagion as hepatitis, a disease known by defendants to have infected a large percentage of persons with hemophilia who used their AHF products.

Plaintiffs allege that defendants continued to use aggressive advertising and marketing strategies to sell their AHF products. Indeed, the defendants downplayed the significant risks of viral infection and AIDS from use of their products, which they knew or should have known existed. In addition, notwithstanding the mounting body of medical and scientific information in 1982 that AIDS likely had a viral etiology, and the almost certain knowledge at that time that it was blood borne, certain of the defendants represented that the risks to persons with hemophilia was remote and that the likelihood of a person with hemophilia developing AIDS as a result of AHF use was insignificant. Defendants also made misleading statements to the effect that development of antibodies to HIV did not mean that a person would develop AIDS.

Plaintiffs allege that defendants should have taken steps in the 1970s to reduce or eliminate known and unknown viruses in their products, which would have eliminated entirely the HIV contamination. Plaintiffs allege that defendants' negligence (in addition to their failure to timely inactivate virus in their products) included:

a) failure to withdraw AHF products from the market once defendants knew or should have known that they might be contaminated with HIV;

b) failure to timely and adequately warn of the risks of using AHF products;

c) failure to advise plaintiffs and other class members in the medical community of safer methods for the treatment of persons with hemophilia;[3] and

d) failure to adequately screen plasma donors to exclude persons at high risk of viral infection, including HIV.

Defendants' petition downplays the seriousness of the devastating harm caused by their products. The petition also seeks to mischaracterize--if not ridicule--plaintiffs' claims.[4]

The core issues in *Wadleigh* include whether the manufacturer defendants failed in the 1970s to respond properly to the existing viral contamination of their products and the known risk of future viral contamination of their products; when they knew or should have known of the risks of future viral contamination of their products; what they did to reduce or eliminate the risk of viral contamination of their products; and whether, if defendants had taken the proper steps to reduce viral contamination in the 1970s or early 1980s, such steps would they have been effective. These core global issues are not case specific. They do not depend on any particular manufacturer's process. They raise the threshold global question of whether

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[3] Treatment alternatives safer than AHF were available to persons with hemophilia--alternatives that did not rely upon plasma pooled from thousands of paid "donors," many of whom were at high risk for viral infections, including HIV.

[4] Defendants proffer factual findings from other courts as to their purported lack of negligence. These factual findings, of course, cannot be part of the record in the present proceeding. *Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 381 (9th Cir. 1992) (district court erred in relying on factual findings made by other courts in granting defendant's motion for summary judgment in HIV contaminated AHF case). This mandamus response is not the time or place for a point-by-point refutation of defendants' incorrect and self-serving characterization of their past conduct.

HIV was a virus that needlessly infected the hemophilia community. The focus is solely defendants' conduct. Plaintiffs allege that defendants were all negligent in the same way at the same time. The resolution of these issues will apply to *every* class member's claim.

Judge Grady has afforded defendants a classwide opportunity which will have maximum utility in resolving--potentially for *defendants'* benefit--the central, global issues common to all blood factor contamination cases: "The result [of the jury verdict forms on the common issues] would be the return of a verdict that would be useable *for* or against the defendants in jurisdictions throughout the country." (Ex. A, p. 33, emphasis added).

If defendants really believe that plaintiffs' claims are as devoid of merit as they argue in their petition, they would embrace class certification--which will provide them with the benefit of collateral estoppel in dozens of jurisdictions. After all, as defendants correctly point out that, there have been defense verdicts in most of the cases tried to date (with the exception of *Walls, supra*).

Defendants assertions thus seem disingenuous. If they prevailed at the class trial, could it seriously be suggested that they would reject the preclusive effect of that verdict and insist on individual trials? Would they appeal a defense verdict, arguing that class certification was improper?

### D. The Class Certification Order Sub Judice

Following extensive briefing, on August 17, 1993, Judge Grady ordered partial class certification in *Wadleigh*. (Ex. A to defendants' petition). Specifically, the court, in an extensive 38 page opinion, certified the negligence and breach of fiduciary duty claims for class action treatment pursuant to Fed. R. Civ. P. 23(c)(4)(A). Ex. A, pp. 35-36.[5] That Order was confirmed by

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[5] The court denied plaintiffs' motions to certify the strict liability, breach of implied warranty, concert of action, or punitive damage claims. Ex. A, pp. 36-38.

subsequent Order entered November 3, 1994 (Ex. B to defendants' petition).[6]

The court denied motions for reconsideration and for certification pursuant to 28 U.S.C. § 1292(b), reasoning:

> The defendant's opposition to class certification is based in part upon their contention that a class trial would not be manageable. The court believes otherwise, but clearly a reviewing court would be in a better position to assess the efficiency and fairness of a trial after it had taken place rather than before. . . . Rather than asking a reviewing court to determine in advance that [a class trial] will or will not work, the trial should be held and evaluated in light of actual experience."

(App. at 78).[7]

Judge Grady's class certification decision was informed by his experience in presiding over a five and one-half week trial involving the same defendants and same subject matter:

> [T]his court has an advantage that a trial judge ruling on a class certification motion usually does not have. It has the advantage of having presided over a trial involving the same subject matter. The case of *Poole v. Alpha*, No. 86 C 7623 (N.D.Ill.), was tried to a jury in this court in 1993. Stephen Poole was a hemophiliac who became infected with the HIV virus as a result of using Factor VIII concentrate and eventually died of AIDS, leaving a widow and

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[6] Defendants contrast Judge Grady's extensive class certification order with earlier denials of class certification motions. None of those cases sought certification of the same class or issues as were certified by Judge Grady. Those other courts did not have the benefit of trying one of these cases to a jury. Further, the other cases were decided on different records.

[7] Defendants also complain about class discovery. They had months to seek class discovery before their response to the class motion was due, but did nothing.

> children surviving. Poole's estate sued the same four fractionators named as defendants in this case, alleging that Poole had used each of their concentrates. The claims and defenses were substantially identical to those that appear to be presented in this case. Expert witnesses testified on both sides concerning the questions of negligence and proximate cause. After 5 1/2 weeks of trial, the jury returned a special verdict finding that "none of the defendants was negligent in any of the ways charged by the plaintiff." Judgment was entered for the defendants, and the case is now on appeal to the Seventh Circuit.

Ex. A, pp. 6-7. As a result, Judge Grady was aware that many of the issues concerning defendants' knowledge, the state of medical knowledge generally, and defendants' practices, would be identical, whether tried in one class action, or repetitively tried hundreds and hundreds of times.[8]

By way of example, in the *Walls* case, *supra*, a core issue related to "Armour's own internal documents and technical articles published in medical journals." 832 F. Supp. at 1482. Why should hundreds of federal juries and judges have to re-review the same technical medical journals? As Judge Grady wrote in the case at bar:

> The trial of the *Poole* case was enormously expensive for both sides, and it is unlikely in the

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[8] At a hearing held on November 3, 1994, Judge Grady discussed the expected course of the class trial. "This is another instance in which my having tried one of these cases is of simply invaluable assistance to me. I know how the defendants will show the state of knowledge. I know how they will show what was known by treaters, what was known in the scientific community, what was known by the government and so on.

They will call--I am always put in mind of Casablanca when I talk about this kind of case--the usual suspects. The usual suspects will appear for both sides. Dr. Francis will be here for the plaintiffs and Dr. Aledort will be here for the defendants, and you will not have any doctor from Poughkeepsie, New York, testifying in this class trial." (Res.App. B).

> extreme that every member of the proposed class in this case would be able to fund a separate action of that kind, even with attorneys working on a contingent fee basis.

Ex. A, p. 7. He continued:

> [O]ne of the principal factual questions in the case will be the state of scientific knowledge at various relevant times concerning the likelihood of transmission of virus by the factor concentrates and what could be done to prevent it. Much of that knowledge was disseminated through scientific journals available to all of the defendants. What the defendant Foundation should have known, and when it should have known it, will be determined by what was reasonably inferable from the available data at various points in time. That inquiry will be the same whether the defendant under consideration be a fractionator or the Foundation.

Ex. A, pp. 9-10. Similarly, the question of "what the defendants should have known and when they should have known it" will be the same whether one jury or 500 juries are asked to consider it. As Judge Grady wrote:

> All defendants have to offer is a succession of separate trials in the various jurisdictions, litigating over and over again the same questions of what was known, when it was known, what should have been done, when it should have been done, and whether it would have worked in any event. These are the same issues that occupied 5 1/2 weeks of a jury's time in *Poole v. Alpha*. Defendants want to do it repeatedly, before jury after jury, with the same witnesses monotonously repeating the testimony that they have given many times before. (Defendants suggest that they would be willing to read the depositions of expert witnesses rather than having them testify live,

> but this takes almost as much time as having the witnesses appear live, and, in any event, the court is doubtful the parties would forego the presentation of live witnesses. In the *Poole* trial, most of the expert witnesses appeared live although their depositions had been taken and they had testified at previous trials).

Ex. A, p. 35.

At the same time, Judge Grady was persuaded that individual issues relating to proximate cause, to identifying which product was actually taken by each individual, and to various defenses, precluded class action treatment of strict liability and breach of warranty remaining claims. Ex. A, pp. 22, 23-26, 36-38.

At the Court's direction, both defendants and plaintiffs proposed plans for dissemination of class notice and the notice plan was considered at four separate hearings. The plan contemplates mailing by first class mail over 57,000 Notices. The mailings will be accomplished by defendant The National Hemophilia Foundation, its member chapters, and other organizations. Indeed, the NHF has reported to the District Court that as of December 1, 1994, it has committed and received commitments to mail over 22,000 notices. (Res.App. C) In addition, plaintiffs contacted hundreds of organizations which treat or otherwise serve persons in the hemophilia community. As a result of these inquiries, plaintiffs' counsel have received written commitments to mail by first class mail over 35,000 notices, for a total of over 57,000 addresses to which notices will be mailed.[9] *Id.*

It is estimated that there are about 20,000 persons with hemophilia in the United States, one half of whom are estimated to have been infected with HIV from AHF. Therefore, 57,000

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[9] The organizations that indicated that they would mail the notice will be provided with postage prepaid notices, and will be reimbursed for out-of-pocket expenses related to the mailing of notices.

mailed notices will likely provide each class member with multiple copies of first class mailed notice.

The notice plan also includes six weekly postings of notice on electronic bulletin boards, such as the Internet and Prodigy, which have electronic bulletin boards directed to the hemophilia and HIV/AIDS communities. It has been estimated that approximately 30 million people in the United States use the Internet bulletin boards.

Further, the court has ordered Summary Notice to be published three times in *USA Today*. *App.* at 100.

Defendants complain about not having a list of class members to whom notices will be mailed. Defendants' own notice plan, however, contemplated virtually all notice by publication. Clearly then, defendants would have no class member list if publication had been adopted as the primary form of notice.

### E. Defendants' Arguments Would Foreclose Any Class Treatment for Mass Torts

Defendants have now filed a petition for a writ of mandamus (actually of prohibition), seeking to have this Court prohibit Judge Grady from certifying any facet of *Wadleigh* as a class action, or from proceeding with this action in any manner as a class action.

It must be realized at the threshold that the logic of defendants' argument in this case--that state laws are supposedly so inconsistent as to make any class-wide treatment of common issues impossible, arbitrary and capricious--would mean that no class certification could ever be appropriate for any type of diversity case. This is not the law. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (state court could adjudicate claims of national class), and cases cited *infra*. The only alternative would be the one Judge Grady sought to avoid: ". . . a succession of separate trials in the various jurisdictions, litigating over and over again the same questions . . . before jury

after jury, with the same witnesses monotonously repeating the testimony they have given many times before." (Ex. A, p. 35).[10]

Defendants' argument is not merely wrong-headed, but out of step with the recent and overwhelming trend in the federal judiciary to avoid repetitive adjudication of identical common issues through class action treatment. Indeed, a federal courts' study committee recently described forecasts of federal court caseload growth as "nightmarish." Committee on Long Range Planning, Judicial Conference of the United States, *Proposed Long Range Plan for the Federal Courts* 15 (Draft for Public Comment, Nov. 1994). One of the Committee's many recommendations addresses the need for case management:

> Special attention to managing the process of litigation may once have been necessary only in specialized categories of cases, especially complex litigation and mass tort claims. Indeed, trial judge involvement in overseeing complex litigation is well accepted. The confluence of pressures on the federal judicial system, however, has made reliance on effective case management vital to the disposition of all types of cases at all levels in the system.

*Id.* at 50. The foregoing recognizes what many courts and commentators already know--that innovation and flexibility in mass tort management are both necessary and appropriate. And with this recognition in mind, Courts of Appeals have refused to disturb trial courts' certifications of national diversity class actions to manage mass torts.

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[10] Just a month ago, the Eleventh Circuit denied a Petition for Writ of Mandamus as to a national class certification based on a complaint alleging numerous state law claims. The underlying complaint included counts sounding in negligence, breach of implied and express warranties, violation of the consumer protection statutes of 49 states and the District of Columbia, negligent misrepresentation, fraud and deceit and RICO. *Roberts v. Bausch & Lomb, Inc.*, C. A. No. 94-1144-W (N.D. Ala.). The Eleventh Circuit denied defendants' Petition for Writ of Mandamus on December 1, 1994. *In Re Bausch & Lomb, Inc.*, No. 94-7118 (11th Cir., Dec. 1, 1994). (Res.App. D).

Defendants made the customary arguments against class certification in the court below. But the tide has already turned. No longer is invocation of the 1966 Advisory Committee Note about certification of mass tort cases valid, for it has been repeatedly rejected and indeed disavowed by one of its drafters.[11]

Courts now focus on the efficiencies and economies (both public and private sector) that flow from the class action device in mass torts. As the court in *In re School Asbestos Litigation*, 789 F.2d 996, 1009 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986),[12] in affirming certification of a national diversity asbestos class action noted, the 1966 Advisory Committee Note was contrary to the more recent trend. If economies in the prosecution of the litigation can be achieved by use of class action procedures, "serious and sympathetic consideration" should be given to certifying a class. *Id.* at 1009. The court opined that "[r]eassessment of the utility of the class action in the mass tort area has come about, no doubt, because courts have realized that such an action need not resolve all issues in the litigation. *See* Fed. R. Civ. P. 23(c)(4)(A)." *Id.* at 1008.

Other mass tort class certifications include, for example, *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 188

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[11] Professor Charles Allen Wright testified that: "I was an ex officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying that mass torts are inappropriate for class certification. I thought then that was true. I am profoundly convinced now that is untrue. Unless we can use the class action and devices built on the class action, our judicial system is simply not going to be able to cope with the challenge of the mass repetitive wrong that we see in this case and so many others that have been mentioned this morning and afternoon." *In re A.H. Robins Co.*, 880 F.2d 709, 731 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) (quoting testimony at class hearing in *School Asbestos* litigation).

[12] The district court denied defendants' motion for decertification. *In re Asbestos School Litigation*, 1990 U.S. Dist. LEXIS 287 (E.D. Pa. January 11, 1990). Defendants later sought mandamus. The Third Circuit again refused to disturb to class certification. *In re School Asbestos Litig.*, 921 F.2d 1338 (3d Cir. 1990). Most of the fifty defendants in that case have settled on a class-wide basis.

(4th Cir. 1993) (upholding class certification in a national diversity asbestos property damage action); *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) (upholding certification of national settlement class of women injured by the Dalkon Shield IUD asserting claims against Aetna, an alleged joint tortfeasor with Robins, $75 million settlement added to $2.75 million Dalkon Shield Claimant's Trust) ("[T]he Advisory Committee's Note suggestion that suit for damages is 'not appropriate' for class certification has proved unworkable and is now increasingly disregarded . . . ."); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472-73 (5th Cir. 1986) (upholding certification of asbestos personal injury class which was later tried and then settled for $107 million); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196-97 (6th Cir. 1988) (certification of a class of persons exposed to a variety of toxic chemicals); *Dante v. Dow Corning Corp.*, 143 F.R.D. 136 (S.D. Ohio 1992) (certifying national class of breast implant recipients), *mandamus denied*, *In re Breast Implant Litig.*, Nos. 92-3420/3462 (6th Cir., May 22, 1992) (Res.App. E); *In re Diamond Shamrock Chem. Co.*, 725 F.2d 858 (2d Cir. 1984), *cert. denied*, 465 U.S. 1067 (1984) (denying mandamus in Agent Orange national personal injury diversity class action). *And see Roberts v. Bausch & Lomb, Inc.*, C.A. No. 94-1144-W (N.D. Ala., Nov. 1, 1994) (fn. 10, *supra*), *mandamus denied*, *In re: Bausch & Lomb, Inc.*, No. 94-7118 (11th Cir., Dec. 1, 1994) (Appellate court denied petition for writ of mandamus to order decertification of national class asserting, *inter alia*, claims for fraud, breach of warranty, and violation of state consumer protection statutes)(Res.App. D).

The existence of significant overarching common questions underscores the common sense of certification of mass tort class actions. As the Third Circuit explained in *In re School Asbestos Litigation*, 789 F.2d at 1010:

> There may be cases in which class resolution of one issue or a small group of them will so advance the litigation that they may fairly be said to predominate.

> Resolution of common issues need not guarantee a conclusive finding on liability, *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985), nor is it a disqualification that damages must be assessed on an individual basis. *See Bogosian*, 561 F.2d at 456.

The Fourth Circuit has a similar view:

> In order to promote the use of the class device and to reduce the range of disputed issues, courts should take full advantage of the provision in subsection (c)(4) permitting class treatment of separate issues in the case and, if such separate issues predominate sufficiently (i.e., is the central issue), to certify the entire controversy as in *Agent Orange*.

*In re A.H. Robins, Inc.*, 880 F.2d at 740. *See Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628, 642 (D.S.C. 1992), *aff'd*, 6 F.3d 177 (4th Cir. 1993) (explaining that: 1) separate issues can be certified, even if they are not the "central" issues; and 2) if the issues certified are the "central" issues, then the entire case can be certified as a class action). *See also Jenkins v. Raymark Indus., Inc.*, 782 F.2d at 472-73 (upholding the certification of a mass-tort asbestos personal injury class) (To predominate, common issues need only "constitute a significant part of the individual cases," and "Judge Parker's plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art of issues with, as that experienced judge says, 'days of the same witnesses, exhibits and issues from trial to trial.'").[13]

The use of Fed. R. Civ. P. 23(c)(4)(A) is not revolutionary. Indeed, every class action for damages, regardless of type, is, in essence, a Rule 23(c)(4)(A) class action. A variety of courts

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[13] The Fifth Circuit in *Jenkins v. Raymark Industries, Inc., supra*, deferred to Judge Parker's experience with asbestos litigation in affirming class certification. Here, Judge Grady is experienced with Factor Concentrate litigation, and is presiding over the MDL-986 proceedings in addition to the class action.

have spoken approvingly of Rule 23(c)(4)(A) certification of common issues for class treatment in mass tort cases. *E.g.*, *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d at 185 ("[T]his circuit has embraced the view that 'the mass tort action for damages .... [is] appropriate for class action [treatment], either partially [or] in whole.'"); *In re: A.H. Robins*, 880 F.2d at 740 ("This court also has admonished district courts to take full advantage of the provision in [Rule 23(c)(4)] permitting class treatment of separate issues' in order 'to promote the use of the class device and to reduce the range of disputed issues' in complex litigation."). *See Sterling v. Velsicol Chem. Corp.*, *supra*, *In re School Asbestos Litig.*, 789 F.2d at 1008-09; *Jenkins v. Raymark Indus., Inc.*, *supra*.

Recently, the Honorable Clarence A. Brimmer certified a class of persons allegedly injured from use of a drug to treat respiratory disorders. *In re: Copley Pharmaceutical, Inc. "Albuterol" Prod. Liab. Litig.*, MDL No. 1013 (D. Wyo., Oct. 28, 1994) (Res.App. F). Judge Brimmer certified the class pursuant to Rule 23 (b)(3) and (c)(4)(A), relying for guidance on Judge Grady's *Wadleigh* class certification Opinion.

While defendants make sweeping and unsubstantiated claims that the Rule 23(c)(4)(A) certification ordered by Judge Grady "usurps" the power of "the Rules Advisory Committee, the Supreme Court and Congress" (petition, p. 5), it does nothing of the kind. To the contrary, it is precisely the type of certification approved in the decisions cited above and endorsed by the *Manual for Complex Litigation Second* (1985):

> Sometimes a class may be certified for certain claims, but not for others. Selectively used, this provision enables a court to achieve the economies of class action treatment for portions of a case, without being overwhelmed by the numerous problems presented if it were necessary to handle all aspects of the case for the entire class...

> The provision authorizing a class for specific "issues" does not require that an entire claim by or against a class be certified. Several courts have assumed that class action treatment might be afforded one or more issues relating to liability, while denying (or deferring consideration of) class certification of other issues affecting liability or questions of damages.
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> *Manual*, 2nd, pp. 217-218.

It is against this record of judicial approval that petitioners must demonstrate that the district court's order constitutes usurpation of judicial power.

Defendants' arguments which deprecate the wisdom of certifying the threshold negligence/breach of fiduciary duty issues because of the need thereafter (in the event of a plaintiffs' verdict) to deal with case-specific issues in "second phase" trials, confront this Court with an extraordinary policy challenge to Rule 23. Defendants' position, if honored, would render the class action vehicle useless as a dispute resolution vehicle in any mass personal injury situation. In any case, even if one were to suppose that issues of negligence and causation were identical, at the very least, the amount of compensatory damages would require a second and separate trial. In any case in which certain claims within a class are time barred, a "second phase" trial would always be required as well. So too, according to their argument, in virtually any personal injury class, some special variant of state law would require individual trial resolution on issues involving causation. What then is the logical conclusion of defendants' position? Evidently, their view is that if a trial court decides to attempt globally to manage one or more issues but cannot frame all issues within the confines of the class action format, then Rule 23 should not be employed.

Defendants' view is simply cross current to the entire trend of contemporary law which reflects the challenge to and the concern of our judicial system in attempting to manage mass tort litigation in an economical fashion. Is the fact that all issues in

a mass tort case cannot be resolved globally in a single class an argument that the courts should not go as far as possible in attempting to apply the class action tool to the resolution of threshold issues?

As an overriding policy matter, this Court should not lightly turn aside what has been an extensive and, plaintiffs believe, thoughtful effort by a district judge to manage globally in so far as he can, a difficult and challenging litigation which affects so vitally the interests of thousands who otherwise likely would never have a day in court.

## II.
## MANDAMUS IS AN EXTRAORDINARY WRIT WHICH SHOULD NOT BE A SUBSTITUTE FOR AN APPEAL

The thrust of defendants' argument is that there is a supposed multiplicity of diverse and disparate state laws concerning negligence, making it impossible to treat any aspect of the negligence claim as a class action under Rule 23. Judge Grady, however, concluded that defendants' statements of divergence of state laws were exaggerated. Ex. A, pp. 14-21.

Defendants' petition should be denied. The stringent legal criteria for a writ of mandamus (or prohibition) have not been met. Such writs are a "drastic" remedy available only in "extraordinary" circumstances and require petitioners to show "that the relief requested cannot be achieved in any other way and that [they have] a clear and indisputable right to that relief." *In re Joint E. & S. Dists. Asbestos Litig.*, 22 F.3d 755, 764 (7th Cir. 1994) (citations omitted). "[I]t is established that the extraordinary writs cannot be used as substitutes for appeals." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383-85 (1953).

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the

> judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy . . . . As extraordinary remedies, they are reserved for really extraordinary causes.

346 U.S. at 384-385. *Accord, Mallard v. United States Dist. Court for Southern Dist.*, 490 U.S. 296, 309 (1989). The district court's order must be so indisputably arbitrary that it amounts "to a judicial usurpation of power." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam).

Defendants' petition meets neither of these two requirements.

**A. The Decision is Reviewable On Final Appeal**

Assuming *arguendo* that Judge Grady actually had committed "clear and indisputable" error in certifying the negligence claim for class action treatment, which he did not, this Court could correct such error on direct appeal. The *Wadleigh* case, in which the certification has been ordered, will proceed to trial and final judgment. At that point, Judge Grady's class certification decision--agreeing to certify certain claims, but declining to certify others--as well as any verdicts returned by the jury pursuant to jury interrogatories or special jury verdict forms, will be fully reviewable on appeal, just as every other decision in the case will be reviewable. "Class rulings are appealable along with a final judgment after it has been entered and appealed." *Newburg on Class Actions*, §7.38 "Appealability of Initial Class Certification or Denial" (3d ed., 1992) p. 7-111. *Accord J.H. Cohn & Co. v. American Appraisal Assocs., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980).

Defendants' mandamus petition is simply an end run around *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). In that decision (which involved an interlocutory appeal of a class certification decision, using the collateral order doctrine and the "death knell" doctrine of appealability), the Supreme Court

strongly admonished that interlocutory review is *not* available for class certification orders absent the district court's certification pursuant to 28 U.S.C. § 1292(b). In *Coopers & Lybrand*, the Supreme Court underscored that class certification orders are inherently conditional and subject to revision, and that permitting interlocutory appeal would frustrate the policy against piecemeal review. *Id.* at 469, 471, 476-77.

Petitioners are attempting "to accomplish by mandamus what *Coopers & Lybrand* so clearly prohibits by way of interlocutory appeal not certified under 28 U.S.C. § 1292(b)." *In re Catawba Indian Tribe*, 973 F.2d 1133, 1137 (4th Cir. 1992), *cert. denied*, 122 L. Ed. 2d 785 (U.S. 1993). *Accord In re School Asbestos Litig.*, 921 F.2d 1338, 1342 (3d Cir. 1990), *cert. denied*, 499 U.S. 976 (1991). *J.H. Cohn & Co.*, 628 F.2d at 998; *Cf. Link v. Mercedes-Benz of North Am., Inc.*, 550 F.2d 860, 862 (3d Cir.) (*en banc*) (denying § 1292(b) interlocutory appeal), *cert. denied*, 431 U.S. 933 (1977).

Defendants' petition does not explain why the class certification decision would not be reviewable on appeal. Defendants claim, at paragraph 45 of their petition, that "errors related to the class trial will not be easy to fix because the class verdict may not be immediately appealable." Yet the class certification decision, and any verdicts returned by the jury, will be fully appealable as soon as final judgment is entered in *Wadleigh*. Why cannot and should not defendants await such time? After all, that is what occurs in every other of the hundreds of cases in the federal judiciary that are treated under Rule 23 each year--whether the class is granted, denied, or, as in the case at bar, a mixture of each. Defendants do not explain why the final judgment rule is not appropriate for this particular case, while it is appropriate for every other class certification decision. Conversely, under defendants' argument, why should not *every* class certification decision--whether granting, denying, or partially granting certification--be immediately reviewable by mandamus? Judge Grady has indicated that any verdict in *Wadleigh* will be appealed. (Res.App. G).

Defendants' appealability argument then degenerates into a specious hypothesis: "If appeal were denied . . . dozens of appeals--to various state appellate courts and federal circuit courts of appeal--would be necessary." (Petition p. 45). There will be *one* appeal of Judge Grady's certification order. That appeal will be to the Seventh Circuit, following, final judgment in *Wadleigh*. Defendants' "ability to obtain relief by an eventual appeal dooms [their] request for mandamus . . . ." *Matter of City of Springfield Ill.*, 818 F.2d 565, 568 (7th Cir. Ill. 1987)

Defendants argument at pp. 45-46 that they will be subject to an "extra litigation burden" of "dozens of appeals" rings hollow. The entire underpinning of defendants' argument is that they *seek* as many different individual determinations as possible in separate jurisdictions, each with its separate appeal, because defendants oppose any attempt at class action treatment of any facet of this case. Defendants also opposed MDL consolidation.

### B. Defendants Have Failed To Show Any Clear And Indisputable Right To A Writ Of Mandamus

Defendants have also failed to show that their right to relief is "clear and undisputable." Defendants' argument, stripped to its essence, is that state laws on negligence supposedly vary among the 50 states and no jury verdict forms can be drafted to comprehend these variations. Defendants assert at page 36 that one jury would become confused by the jury interrogatories which their petition speculates will be necessary.

Yet, no actual jury interrogatories or jury verdict forms have yet been drafted or ordered by the district court. Hence, defendants' argument--like their arithmetic--is merely speculative. Defendants pose to this Court, in the guise of a petition for mandamus or prohibition, a request for a purely hypothetical or speculative advisory opinion: that no suitable jury verdict forms can possibly be drafted that are fair to the parties. However, "[i]nterference with the trial court's control over its own proceeding is not a matter to be undertaken lightly

or on the basis of mere speculation by the parties or the reviewing court about what may occur at some future date." *Arthur Young & Co. v. United States Dist. Court*, 549 F.2d 686, 692 (9th Cir. 1977).

Under normal rules, an appellate court would not rule upon such a speculative contention. The Court would insist on seeing what actual verdict forms were sent to the jury, and what use the jury made of those forms. Anything short of that would be a request for a ruling that is merely advisory, speculative, and hypothetical. *See*, for example, the Third Circuit *en banc* decision in *Link*, 550 F.2d 860, where, in a related context, the court concluded it was merely being asked for an advisory opinion about class certification by the defendants.

This sound rule is especially pertinent in the context of a request for a writ of mandamus or prohibition. It is not logically possible to conclude that defendants have a "clear and indisputable right" not to have certain jury interrogatories used at trial, when those interrogatories have not yet been drafted or ordered to be used. Yet that is precisely what defendants' petition seeks.

That mandamus is not the appropriate route to contest Judge Grady's class certification decision, and that Judge Grady's class certification order does not constitute clear and indisputable error, is illustrated by *Arthur Young & Co. v. United States District Court*, 549 F.2d 686 (9th Cir. 1977). In *Arthur Young*, the District Court certified a class to determine at trial certain liability issues of general application and reserved other issues (such as reliance (causation), duty, each class member's knowledge of the allegedly omitted material facts, and amount of damages) for separate determination by individual claims to be filed within 90 days of judgment in favor of plaintiffs in the class trial. The class certification order (as here) was entered after extensive briefing and "serious and careful consideration of the entire matter by the district judge." *Id.* at 690. Defendant sought a writ of mandamus to require the district court to vacate the class certification order. Defendant argued, as defendants do

here, that the district court's class certification would deny its Seventh Amendment right to a jury trial on liability and damages and that, if subjected to a class trial on common issues, it would be subject to a great number of class member trials on individual issues.

The Ninth Circuit rejected defendant's contentions and denied the petition, stating that "petitioners have not demonstrated with certainty that the district judge made a clear and indisputable mistake in certifying the class issues and separating certain other issues for individual adjudication." *Id.* at 692. The court observed that district courts have the power to order a separate trial of issues under Fed. R. Civ. P. 42(b) and 23(c)(4)(A), and have "extensive powers" under Rule 23(d) "to expedite [a class] suit with procedural innovations." *Id.* (quoting *Blackie v. Barrack*, 524 F.2d 891, 907 n.22 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976)).

Further, wrote the *Arthur Young* court, trial by jury is not an absolute right, and "there is no Seventh Amendment requirement that all evidence be presented to the trier of fact at one hearing." *Id.* at 693. Considering the 1931 *Gasoline Products, Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931) case (which predates the modern Federal Rules of Civil Procedure, the 1966 Amendments to Rule 23, and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (which approved use of offensive collateral estoppel[14])), the Ninth Circuit stated that "[a]s long as the form of trial adopted by the trial court 'will afford opportunity for the consideration by the jury' provided at common law, there is no violation of the rights to a jury trial." The court "perceive[d] no absolute bar, constitutional or otherwise, to resolution of any remaining issues [after the class trial] before either the same *or*

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[14] A class liability determination may be used offensively to collaterally estop defendants from contesting issues decided in the class trial in subsequent proceedings, *Parklane Hosiery Co. v. Shore*, *supra*. Further, Rule 23(c)(1), (2), provides that any judgment for or against the class is binding on all class members.

*a second jury*." *Id.* (footnote omitted, emphasis added), 693-7 (permissible to separate individual damage issues).

Judge Grady's class certification is similar to that in *Arthur Young*. The present MDL cases (and any others that may be filed) will provide the forum for resolution of individual issues--such as date of HIV infection and the knowledge of the patient or physician about the risks of using AHF. There is no Seventh Amendment violation.

The Ninth Circuit in *Arthur Young* also applauded the district court's attempt to manage the cases before him:

> It is a novel and innovative step which the district judge has taken here. If his judgment proves sound, it is a step which may result in a significant advance in methods available to courts to save time and money for litigants and judges, not only in these law suits, but also in other complex litigation where the trial judge and counsel for the parties may find the path to resolution easier because traveled before. Neither the courts nor the bar have extensive experience with actual trial of these complex cases, and, as set out in note 22 to the opinion in *Blackie v. Barrack*, *supra* 524 F.2d at 906-07, this Court of Appeals has committed the resolution of many management problems that arise in such cases to the sound discretion and experience of the district judge. We refuse to hold that the steps taken by the trial judge here are error, therefore, particularly prior to the time, if ever, that the harm done by the order to the rights asserted by the petitioners becomes manifest in the record of these cases and the experience of the parties below.

*Id.* at 697.

Implicit in the promulgation of Rules 23 and 42 is the recognition that the Seventh Amendment does not "prohibit the introduction of new methods for ascertaining what facts are in

issue." *Hosie v. Chicago and N. W. R. Co.*, 282 F.2d 639, 643 (7th Cir. 1960). Thus, trial bifurcation "has been approved as an effective method of simplifying factual presentation, reducing costs, and saving time." *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1167 (7th Cir. 1983) (citations omitted). The Supreme Court has made clear that the Seventh Amendment "was designed to preserve the basic institution of jury trial in only its most fundamental elements," and that the scope of permissible procedural forms are not fixed but instead may evolve. *Parklane Hosiery Co. v. Shore*, 439 U.S. at 336-37 (quoting *Galloway v. United States*, 319 U.S. 372, 390, (1943)).

There are additional reasons why defendants' right to relief--a prohibition against any class action treatment for any facet of *Wadleigh*--is not "clear and indisputable." As Judge Grady observed, defendants have overstated the extent of variance of state laws of negligence. (Ex. A, pp. 14-21). Indeed at a conference in this case in the District Court, Armour's counsel, responding to a question from Judge Grady, conceded that the definition of negligence might be the same in all 50 states. (Hearing, Feb. 25, 1994) (Res.App. A). Miles' counsel also "agreed with the court, that negligence might be the same in all the states . . . ." *Id.*

The application of various states' laws is not a bar to class certification, and, in fact, in two widely cited mass tort cases where national classes were certified, the respective courts analyzed the applicable negligence law and concluded that it did not vary significantly enough from one jurisdiction to another to preclude class certification, since virtually all states have adopted §388 of the Restatement (Second) of Torts.

For example, in *In re Asbestos School Litigation*, *supra*, the district court certified a nationwide class of school districts seeking damages from dozens of defendants for the cost of asbestos containment or removal. Defendants contended that class certification was unwarranted because, *inter alia*, the court

would have to apply various state's laws to the class members' claims. The trial court disagreed, stating:

> One matter, bearing on the manageability of this litigation, which defendants raise in opposition to any type of class certification, is the applicability of the state law of 54 jurisdictions. At first blush, this aspect of the litigation would seemingly prevent nationwide class certification. *See Brummett v. Skyline Corp.*, No. C 81-0103(B), slip op. at 9-10 (W.D.Ky. April 11, 1984); *Harrigan v. United States*, 63 F.R.D. 402, 405 (E.D. Pa. 1974). However, on further reflection, the problem is not nearly so complex. First, there is substantial duplication among the various jurisdictions so to the applicable law. For example, as to negligence, 51 jurisdictions are in virtual agreement in that they apply the Restatement (Second) of Torts §388 . . . Finally, as the need arises, subclasses can be created to account for variances pursuant to Rule 23(c)(4). *Fox v. Prudent Resources Trust*, 69 F.R.D. at 77.

*In re Asbestos School Litig.*, 104 F.R.D. 422, 434 (E.D. Pa. 1984) (footnote omitted). The Third Circuit affirmed the class certification. *In re School Asbestos Litig., supra.*

Similarly, in *In re Cordis Corporation Pacemaker Product Liability Litigation*, MDL No. 850 (S.D. Ohio, Dec. 1992) (Res.App. H), the district court conditionally certified a national class of persons who were implanted with allegedly defective cardiac pacemakers. In certifying the plaintiffs' state law claims, the trial court rejected arguments virtually identical to those raised by defendants:

> It has been recognized that virtually every jurisdiction applies the same legal standards in a negligence claim, that of §388 of the Restatement, Second, of Torts. *In re Asbestos School Litigation*, 104 F.R.D. at 434 . . . . Accordingly, as to that claim,

> the fact that this case involves a nationwide class does not prevent the Court from concluding that common questions of law predominate.
>
> * * *
>
> The diversity in the *source* of the governing legal standards does not mean that the standards themselves will differ. For instance, as is stated above, the legal standards which govern negligence actions are universal.

Slip op. at 27, 35 (emphasis in original, footnote omitted).

Here, unlike *Shutts*, the district court *has* considered possible variations in state law, but only for purposes of deciding the class certification motion. The court has not yet determined under *Shutts* (and it did not have to at this stage of the litigation) if Illinois law or any other states' law would be applied to all class members' claims. Indeed, defendants' speculation about what law will apply precisely underscores one of the reasons a writ of mandamus should not issue. Judge Grady has not determined what law will apply and has not even had the opportunity to make such a determination.

The court below correctly noted that under *Phillips Petroleum Co. v. Shutts*, *supra*, it is not necessary to assume that 50 separate state laws will actually apply. Rather, any state that has a significant contact with the controversy can constitutionally have its substantive law apply. (Ex. A, pp. 29-30). It is also possible that Illinois law could be applied to all the claims against defendants. *See Phillips Petroleum Co. v. Shutts*, *supra*. *See Endo v. Albertine*, 147 F.R.D. 164, 169 (N.D. Ill. 1993). Two defendants, Armour and Baxter, respectively, have a major manufacturing facility and a corporate headquarters in

Illinois (and all four of the Fractionators Defendants do business there).[15]

Finally, the trial court expressed its concern with carefully drafting jury verdict forms to insure maximum coverage and utility:

> [Utility] depends upon whether the negligence issues could be framed in a way that would make the verdict of the jury a suitable predicate for further proceedings under the negligence law of the particular jurisdiction under principles of collateral estoppel.

(Ex. A, pp. 30-31). The district judge outlined a specific manner by which this can be accomplished, keying on the time frame of each defendants' knowledge (*Id.*, pp. 32-33). The court acknowledged that such verdict forms are not boilerplate, and will have to be carefully crafted prior to trial:

> Verdict forms of this kind are not found in form books, and they will have to be prepared with great care if the verdict of the jury is to have the collateral utility contemplated in this opinion. The court is convinced that it can be done. The result would be the return of a verdict that would be useable *for* or *against* the defendants in jurisdictions throughout the country.

(*Id.* at p. 33).

Thus, Judge Grady is clearly contemplating a jury verdict form which--to the extent it finds for one or more defendant--will have collateral estoppel effect useable by that defendant in other jurisdictions. It is certainly not "clear and indisputable" that there is no possible utility to such procedure. To the

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[15] In addition, defendants have ignored (and pretend that it does not exist), the district court's determination in *Walls, supra*, holding that federal regulatory provisions impose a common duty upon the defendants in this case. That holding, if applied in the case at bar, would further diminish or eliminate any purported differences among state law.

contrary, this procedure on its face appears to have enormous practical utility in conserving judicial resources while promoting fairness and certainty for both defendants and plaintiffs.

Thus, it is clear that the petition cannot meet the stringent standards for a writ of mandamus or prohibition.

### C. Mandamus is Inappropriate to Challenge a Class Certification Decision

Defendants' petition inaccurately portrays the role of mandamus. At p. 17, defendants state that "inconveniences" associated with "erroneous certification of a class" warrant issuance of writs of mandamus or prohibition. This has not, and never has been, the law.[16] This Court apparently has never issued a writ of mandamus to order a district judge to decertify a class. Indeed, this Court has never held that the writ is even available for such a purpose. Defendants' petition fails to address this issue.

Although mandamus acts as a "safety valve in the final judgment rule," mandamus is particularly inappropriate for orders granting class certification. Congress already has included a safety valve in Rule 23: class certification orders are inherently conditional. The district court has discretion to alter or amend such orders at any time before decision on the merits. Fed. R. Civ. P. 23(c)(1). Accordingly, "it is the common practice to leave a class action order subject to redetermination as the litigation continues." *In re Piper Aircraft Distribution Sys. Antitrust Litig.*, 551 F.2d 213, 217 (8th Cir. 1977) (denying interlocutory review). *See, e.g., Central Wesleyan*, 6 F.3d at 189-90.

The decision whether to certify a class is committed to the discretion of the district court. *Rosario v. Livaditis*, 963 F.2d 1013 (7th Cir. 1992), *cert. denied*, 122 L. Ed. 2d 127 (U.S. 1993). "Where a matter is committed to discretion, it cannot be

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[16] Indeed, it is well settled that the "hardship" resulting from delay and a potentially unnecessary trial are insufficient to warrant mandamus relief. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964).

said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam). *Accord, Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978) (plurality opinion). *Allied Chemical* and *Will* suggest that the stringent standard for mandamus can *never* be satisfied where the challenged decision was committed to discretion.

Although this Court apparently has never issued the writ to vacate a class certification order, the Court has discussed the propriety of its use for that purpose. In *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir. 1976), this Court denied interlocutory review of a refusal to certify a class but noted in footnote *dicta*: "We believe that in the rare situation where a trial court acts with total arbitrariness in ruling on class certification, or neglects to issue initial ruling the litigants will be protected by the ultimate remedy of mandamus . . . ." *Id.* at 1368 n.5. Neither circumstance exists in this case.

Four years later, in *J.H. Cohn & Co v. American Appraisal Associates, Inc.*, 628 F.2d 994, 998 (7th Cir. 1980), this Court denied a petition for a writ of mandamus directing a judge to certify a class. This Court reached the merits of the petition but refused to issue the writ, holding that the district court did not usurp judicial power or indisputably abuse its discretion. *Id.* at 998. In footnote dicta, however, this Court noted the tension between the *Anschul* dicta and the plurality opinion in *Will*:

> Four justices of the Supreme Court have indicated that when a matter is committed to the discretion of a district court a writ of mandamus is not appropriate. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978) (opinion of Rehnquist, J.).
>
> This court, in dictum, has previously indicated that a writ of mandamus may issue directing a district judge to certify a class if the refusal to certify was wholly arbitrary. *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364, 1368 n.5 (7th Cir. 1976)."

*Id.* at 998 n.2. Three months later, the Supreme Court in *Allied Chemical* reaffirmed the statement it made in *Will.* 449 U.S. at 35.

Respondents submit that the per curiam opinion in *Allied*, coupled with the *Coopers & Lybrand* admonition that interlocutory review of class certification decisions is improper absent § 1292 certification, forecloses the relief that petitioners request. The Fourth Circuit Court of Appeals revisited the availability of mandamus in light of the foregoing and stated:

> The exceedingly demanding standard for the issuance of the writ of mandamus to compel a discretionary act by a district court, the fact that whether to certify a class clearly is such a discretionary act, and the Court's decision in *Coopers & Lybrand*, might well justify a conclusion that mandamus will not lie to compel class certification.

*In re Catawba Indian Tribe*, 973 F.2d at 1137 (opinion of five Circuit Judges).

Petitioners cite a short list of inapposite cases, but fail to cite a single case granting a writ of mandamus to decertify an opt-out class such as certified Judge Grady. Petition for Mandamus at 18. *In re Temple*, 851 F.2d 1269 (11th Cir. 1988), involved a mandatory limited fund class action where plaintiffs challenged the failure to provide to state court plaintiffs notice and an opportunity to be heard as a violation of due process. *Id.* at 1272 (distinguishing Rule 23(b)(3) opt out classes). *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984), also was a mandatory limited fund class. The district court failed to make any findings as to the limited fund, and specifically found no common triable issues, yet certified a class for settlement purposes. *Id.* at 302-04. *In re Exterior Siding & Aluminum Coil Antitrust Litigation* (M.D.L. No 454), 696 F.2d 613 (8th Cir. 1982), involved an extraordinary situation where the MDL transferee judge overruled three prior denials of class certification in the same case by a transferor judge from the same

court. *Id.* at 616-617. In *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976), the court *denied* mandamus as to the Rule 23(b)(3) class but granted mandamus on the mandatory Rule 23(b)(1) class, holding that damage class actions were precluded under subsection (b)(1) by Circuit precedent. *Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975), simply held that Rule 23 class actions were not permitted under § 16(b) of the Fair Labor Standards Act. *McDonnell Douglas Corp. v. United States District Court for Cent. Dist.*, 523 F.2d 1083 (9th Cir. 1976) involved ostensibly the same issue as *Green*. And as noted above, *Anschul* was not a mandamus case at all. Accordingly, the cases petitioners cite are no support for the proposition that mandamus is appropriate in this case. To the contrary, the careful, extensive decision by Judge Grady, considering at length defendants' arguments in light of Rule 23's standards, is precisely the type of discretionary ruling which is totally inappropriate to vacate by writ of mandamus or prohibition.

The issue before the Court is really a narrow one. Will this Court - against a clear and indisputable error standard - turn aside class certification on the dispositive threshold issues of negligence and breach of fiduciary duty, assuring that multiplicity of litigation will persist for many years with predictably disparate results. Or rather, will the trial court be permitted to attempt to forge a global dispute resolution vehicle to resolve so much of the controversy as can reasonably be resolved in common. Again, the apparent benefit to the defendants themselves in terms of their expectation of success based on all the prior litigation experience seems overwhelming. Nowhere in fact in their papers do defendants identify any prejudice resulting to them from Judge Grady's certification order.

## III. CONCLUSION

The Fifth Circuit, in affirming certification of an asbestos personal injury mass tort action and bifurcated trial plan in *Jenkins v. Raymark Industries, Inc., supra*, found the court's plan

of trying common issues superior to the defendants' scenario of trying every issue again and again with the same parade of witnesses testifying as to historical events in the same fashion. Judge Grady has made a similar observation here. And, as the court observed in *Central Wesleyan*, 6 F.3d at 190, "[t]he course chosen by the district court deserves the chance to succeed in resolving issues of unquestioned importance in this litigation . . . [t]he district court for its part proceeded with caution in its conditional certification order, and accordingly, did not abuse its discretion..." The course chosen by the district court here should also be given a chance to succeed.

It is respectfully submitted that for all the foregoing reasons, defendants' Petition for Writ of Mandamus should be denied.

Dated: January 3, 1995

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-3912

RHONE-POULENC RORER INC.,
ARMOUR PHARMACEUTICAL COMPANY,
MILES INC., BAXTER HEALTHCARE CORPORATION, and
ALPHA THERAPEUTIC CORPORATION, Petitioners,

v.

HONORABLE JOHN F. GRADY, Judge,
United States District Court
for the Northern District of Illinois, Respondent.

**REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS**

This petition arises from *Wadleigh et al. v. Rhone-Poulenc Rorer Inc. et al.*, No. 93 C 5669 (N.D. Ill.)

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**REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS**

## INTRODUCTION

Plaintiffs have argued that this case involves a routine class certification order that should not be the subject of a mandamus petition. Resp. at 16-17. Plaintiffs are wrong. The class "issue" trial contemplated by the District Court is unlike any trial ever proposed--much less actually tried--by any federal court. It will violate Rule 23 and the constitutional rights of the fractionator defendants. Further, spinoff cases, which might otherwise not have been brought, will clog state and federal courts for years to come. These harms -- unique to this case--can only be avoided through immediate issuance of a writ of mandamus.

**THE EXTRAORDINARY REMEDY OF MANDAMUS IS WARRANTED IN THE EXTRAORDINARY CIRCUMSTANCES OF THIS CASE.**

**1. No court has ever authorized a class "issue" trial like the one contemplated by Judge Grady.** Plaintiffs' principal argument is that mandamus should be denied because the "overwhelming trend in the federal judiciary" is to allow class certification in mass tort cases. Resp. at 18, 20. Assuming *arguendo* that such a trend exists, it has no relevance to this case.

A. There is no precedent for certifying a class with knowledge that full-blown individual trials for each putative class member will be necessary to adjudicate the liability of the defendants. That is what Judge Grady has done in this case. Under his certification order, the stage one class "issue" trial will not result in an entry of judgment or even a determination of liability. Rather, the jury will be asked to determine whether each of the fractionator defendants is "guilty" of negligence under some--but not all--of the theories posed by plaintiffs. If there is even a partial verdict for plaintiffs, full scale stage two trials--brought in other courts--will be necessary before any plaintiff can obtain a judgment.

The lack of law supporting such a "class" certification order is not surprising. In *Bieneman v. Chicago*, 864 F.2d 463, 465 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989), this Court recognized that such a trial would likely produce nothing more than an unconstitutional advisory verdict.

B. The cases cited by plaintiffs do not support the proposition that important differences in state law can be overlooked in order to allow class actions to go forward. Even in asbestos litigation--which threatened to paralyze the federal judiciary--appellate courts have permitted certification of nationwide classes only when provision was made to deal with such differences under a state-by-state analysis of both choice-of-law and substantive law. *See, e.g., In re School Asbestos Litigation*, 789 F.2d 996, 1010 (3d Cir.), *cert. denied*, 479 U.S.

915 (1986); *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993). *See also In re Diamond Shamrock Chem. Co.*, 725 F.2d 858, 861 (2d Cir. 1984), *cert. denied*, 464 U.S. 1067 (1984) (reluctantly allowing certification in Agent Orange case where trial judge declared his intention to create subclasses as dictated by variations in state law). Important differences in state law governing foreseeability and standard of care foreclose certification of a nationwide negligence "issue" class here. *See* Petn. at 20-31.

**2. Plaintiffs' claims are based on a novel theory that turns on foreseeability and the standard of care, yet plaintiffs fail to address important differences in state law governing these issues.** Plaintiffs freely admit that the core of their negligence case is predicated upon the theory that the fractionator defendants had a duty dating from the 1970s to reduce or eliminate "the viral contamination" of factor concentrates by all "known and unknown viruses"--including contamination with the then unheard of retrovirus HIV. Resp. at 7-9. In their opening brief, fractionator defendants demonstrated that the legal standard to be applied to claims based on this "serendipity" theory could vary widely from state to state because of significant differences in state law governing foreseeability and the standard of care. Petn. at 22-28. Plaintiffs have wholly failed to address these significant differences in state law.[1]

Instead, plaintiffs have tacitly recognized that the District Court's decision cannot be justified on the grounds previously

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[1] Similarly, plaintiffs ignore the District Court's failure to engage in any substantive choice-of-law analysis, despite the fact that the cases upon which they rely recognize that the predominance requirement of Rule 23 mandates such an analysis. *See, e.g., In re Cordis Corp. Product Liability Litig.* (Resp. App. H at p. 25) (If legal standards differ from state to state and are significant, common issues of law would not predominate). The court in *Cordis* conducted an extensive choice-of-law analysis not conducted by the District Court here.

asserted by plaintiffs and relied upon by the District Court. Plaintiffs have therefore offered several new arguments.

A. Plaintiffs suggest that the District Court may yet resolve issues regarding variations in state legal standards. Resp. at 36-37. However, it is plaintiffs' burden under Rule 23 to establish lack of variation in state law in order to secure class certification. *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *see also Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 265 (S.D. Cal. 1988). Plaintiffs did not--and cannot--make that showing. They therefore failed to meet the requirements of Rule 23. The District Court certified the issue class based on its erroneous "belief" that state negligence law does not vary and that these claims can be tried under a uniform nationwide standard. Petn., Tab A at 18.

B. Plaintiffs seek to rely on grounds never before raised by the plaintiffs below or addressed by the District Court. For example, plaintiffs argue that negligence law does not vary significantly, "since virtually all states have adopted Section 388 of the Restatement (Second) of Torts." Resp. at 35. Section 388 is titled "Chattel Known to be Dangerous for Intended Use." Whether or not this standard applies to factor concentrate litigation will have to be determined on a state-by-state basis; "virtually all states" have adopted statutes defining the processing and distribution of such plasma derivatives as provision of a "service" rather than as the sale of a "chattel." *See* Petn. at 32 n.31 (collecting state blood shield statutes).

C. Plaintiffs suggest for the first time here that a federal standard may apply to their warning claims. *See* Resp. at 2, 37 n.17. This argument should be rejected for at least three reasons:

(i) Whether a uniform standard applies to the warning claim has no bearing on what plaintiffs themselves have characterized as the "core issues" and "threshold global question" regarding

the alleged duty in the1970s to have eliminated unknown viruses from factor concentrates.

(ii) Plaintiffs' new position is at odds with the positionthat they have taken in all prior factor concentrate litigation--that there is no federal preemption.

(iii) The alleged federal standard was never considered by the District Court as a basis for certification of this *negligence* "issue" class is no basis for concluding that the District Court would rely on that theory.

**3. The proposed class proceedings present overwhelming management problems that plaintiffs have failed to address.** Plaintiffs' response ignores most of the manageability problems identified by the fractionator defendants in their petition. *See* Petn. at 34-36. Specifically, plaintiffs do not address the extensive duplication of evidence between the class "issue" trial and the subsequent trials of individual plaintiffs. Nor do they address the collateral estoppel problems flowing from the District Court's class certification plan.

The arguments that plaintiffs do present are disingenuous. For instance, they repeatedly assert that a pro-defendant verdict at the proposed class trial could conclude this litigation. *E.g.*, Resp. at 37-38. However, plaintiffs fail to mention that class members will nevertheless attempt to pursue negligence claims that were not part of the class trial, as well as claims based on theories other than negligence. In addition, putative class members will no doubt attempt to challenge the binding effect on them of any "issue" trial giving rise to a defense verdict. *See* Petn. at 42-43, App. 91-97.

Plaintiffs also attempt to mislead the Court by mischaracterizing defendants' Seventh Amendment argument. Defendants' constitutionally guaranteed right to trial by a jury will be violated by having different juries decide overlapping and interconnected questions of liability. *See Alabama v. Blue*

*Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) ("inherent in the Seventh Amendment guarantee of a trial by jury is the general right of a litigant to have only one jury pass on a common issue of fact"). *See* Petn. at 46-47. Plaintiffs cite the *Manual for Complex Litigation Second* (1985) to support the propriety of certifying a special issue class. *See* Resp. at 23. However, they deliberately omit the passage immediately following the text they quote:

> In considering such an approach, the court should ensure that the issues certified for class action treatment (1) *are sufficiently separate from other issues that a severed trial will not violate constitutional rights to trial by jury* and (2) will, when judgment is entered, support appellate review.

*Id.* at 218 (emphasis added). The District Court's proposed certification will thus generate additional litigation on the Seventh Amendment issue in every Stage 2 trial.

The Manual further provides that

> for reasons of fairness and efficiency, if not to comply with constitutional requirements, the issues should not be separated in such a manner that a second jury will (or should) hear basically the same evidence as the first jury and, in effect, may be able by its verdict to overrule the first jury.

*Id.* at 111. The issues certified for class treatment are impossible to separate from the issues that will inevitably be litigated in the trials of individual class members. *See* Petn. at 36-40.

**4. Plaintiffs are mistaken in urging that mandamus should not issue to correct the District Court's erroneous class certification decision.** Plaintiffs next argue that mandamus should not issue to correct a routine class certification

decision. Resp. at 42-43.[2] Fractionator defendants do not dispute that proposition. This, however, is not a routine class certification decision.

Contrary to plaintiffs' unsupported assertion, it is far from clear that the verdict of the class "issue" trial will be appealable. The class "issue" trial will produce only a series of discrete findings regarding fractionators "guilt" on a range of negligence theories asserted by plaintiffs. Such findings may not constitute a final judgment within the meaning of 28 U.S.C. § 1291. Moreover, there is no guarantee that such naked findings will be reviewed pursuant to 28 U.S.C. § 1292(b) (allowing interlocutory appeals at the discretion of the District and Appellate Courts in cases involving controlling questions of law). *See* Petn. at 40-43.[3]

Moreover, plaintiffs fail to address the myriad burdens that this erroneous certification order will impose upon the fractionator defendants and the judicial system--none of which can be remedied through delayed appellate review. *See* Petn. at 45-48.

**5. The MDL proceedings will not be affected by issuance of the writ of mandamus.** Contrary to plaintiffs'

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[2] None of the cases cited by plaintiffs support their proposition that mandamus is an inappropriate vehicle to challenge a class certification decision. *See Arthur Young & Co. v. United States Dist. Court*, 549 F.2d 686, 691-92 (9th Cir. 1977) ("The Supreme Court has thus directed us to examine, on a petition for a writ of mandamus [whether the class certification was in error]"); *In re School Asbestos Litig.*, 921 F.2d 1338, 1342 (3d Cir. 1990) (where petitioner "clearly has alternative means available under 28 U.S.C. §1292(b)," Court would not consider mandamus relief), *cert. denied*, 499 U.S. 976 (1991); *In re Catawba Indian Tribe*, 973 F.2d 1133, 1137 (4th Cir. 1992) (mandamus "might" not be available "to *compel* class certification") (emphasis added), *cert. denied*, 122 L. Ed. 2d 785 (U.S. 1993); *J.H. Cohn & Co. v. American Appraisal Assocs., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980) (mandamus denied where Judge's refusal to certify a class was not arbitrary).

[3] Plaintiffs may be suggesting that the fractionator defendants will be able to pursue an appeal of an adverse class verdict after the phase 2 trial of one of the named plaintiffs. This, however, assumes that at least one of the Phase 2 trials will result in a judgment against defendants.

suggestion, Resp. at 5, this petition does not challenge the coordinated discovery underway in the MDL proceedings. *In Re "Factor VIII or IX Concentrate Blood Products" Prods. Liab. Litig.*, 853 F. Supp. 454 (J.P.M.L. 1993). The MDL consolidated discovery will continue whether or not mandamus issues. Pretrial discovery orders will continue to be effective. Firm discovery deadlines will remain in place. The plaintiffs' document depository will continue to operate, and the "[m]ore than one hundred deposition transcripts" accumulated by the plaintiffs will no doubt retain their effectiveness. Moreover, discovery had been ongoing for months before the class certification order here. In short the plaintiffs' attempt to portray this petition as a roadblock to ongoing discovery is unpersuasive.

## CONCLUSION

For the reasons presented above and in their petition, the fractionator defendants respectfully request the Court to issue a writ of mandamus directing the District Court to vacate its order of class certification.

Respectfully submitted,

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*Chambers of*
*John F. Grady*
*Judge*

February 3, 1995

Ms. Dianne M. Nast
Mr. Douglas F. Fuson

Re: Wadleigh, et al. v.
Rhone-Poulenc Rorer, et al.
Case No. 93 C 5969

Dear Ms. Nast and Mr. Fuson:

This letter is in response to Ms. Nast's letter of January 31 and Mr. Fuson's letter of February 1 concerning my plans for trial in this case. It is prompted by the categorical nature of Mr. Fuson's assertion that there will be no issue tried in this case beyond the negligence and fiduciary duty issues. For me to make no response might be interpreted as acquiescence in his conclusion, and I do not want there to be any such misunderstanding.

As far as I know, I have never spelled out exactly what will happen in the *Wadleigh* case if there is a plaintiffs' verdict. (I have indicated that if there is a defendants' verdict, the case is over for practical purposes--either for the class or for the *Wadleigh* plaintiffs individually.) In fact, I do not recall this issue being briefed by the parties in connection with the class certification motion. I did not address it in my memorandum opinion of August 17, 1994, in which I decided that motion. As I recall it, the issue was raised by the defendants only when they moved to reconsider the August 17 opinion. Even then, it was not argued with anything like the focus I take it the Court of

Appeals gave it during the mandamus arguments earlier this week.

In any event, I am aware that the trial of the limited issues could not result in entry of a final judgment, unless, of course, the jury found for the defendants. In that event, I believe it would be proper to enter final judgment in favor of the defendants on the negligence and fiduciary duty issues and hope that an interlocutory appeal would lie under either 28 U.S.C. §1292(b) or Rule 54(b) of the Federal Rules of Civil Procedure, despite the fact that the strict liability and breach of warranty counts would still be pending.

A more difficult problem will be presented if the jury finds for plaintiffs. In order to have an appealable judgment, I think it would be necessary to go forward and try the issues of proximate cause and damages at least as to *one* plaintiff. That would result in a money judgment that I hope would be appealable under §1292(b) or Rule 54(b), despite the fact that the claims of the other plaintiffs would still be pending and unresolved. The reason I do not suggest that I would try the issues of proximate cause and damages for *all* plaintiffs before any appeal is taken is that such an undertaking would require years to complete. There are twelve sets of plaintiffs in the case, implicating the peculiar circumstance as to how each of twelve different hemophiliacs was infected with HIV. Unless, for some reason I am not presently aware of, there are two or more plaintiffs whose claims are sufficiently similar that they could be tried together without undue confusion, there will probably have to be twelve separate proximate cause-damage trials. I am not sure that I am physically capable of doing this, but I do know that, whoever does it, it would probably require no less than three to four weeks per claim. It seems to me that it would make eminently good sense to get a decision on whatever appellate issues are involved in the first trial before expending the resources necessary to try the other eleven. The propriety of class certification, and most other legal issues, would be substantially the same for all cases, as far as I can tell. This is

why I am hopeful that the Court of Appeals would accept an interlocutory appeal from the first judgment.

Ms. Nast is quite correct in her statement that a specific trial plan is not yet in place. That is perhaps an understatement. Certainly I have not previously spelled out the above analysis, nor have I had the occasion to do so. As Mr. Fuson points out in the last paragraph of his letter, I should hear further argument from the parties before deciding on the best course. But Mr. Fuson seems to want it both ways: he wants the impression left that I have made up my mind there will be *no* further trial of any kind in this court beyond the trial of the limited issues I have certified for class treatment. That is not a fair assessment of my intentions or, for that matter, of the state of the record.

When I indicated that, class action or not, we will proceed to trial on October 2 only on the negligence and fiduciary duty issues, it was not my intention to indicate that under no circumstance would there be further trial of additional issues. It was simply a statement that, in the absence of class certification, the trial would be bifurcated in the same way many cases in this court are bifurcated for trial, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure. Separate juries would be required, and I realize defendants have raised, on one of their motions for reconsideration, and now on the mandamus petition, a question as to whether this would violate the Seventh Amendment. I do not believe that it would, but this seems to me an issue that could appropriately be addressed, in light of a full trial record, on an appeal by defendants from a money judgment in favor of one of the plaintiffs.

It strikes me as anomalous that I am expressing these views in a letter to you rather than addressing them to the Court of Appeals, whose curiosity about my intentions apparently prompted Ms. Nast's letter and Mr. Fuson's response. I recall that the late Judge Perry once argued personally in the Court of Appeals in response to a challenge to the propriety of some action he had taken. In a sense, I wish I could do that here. But short of that, I can by this letter at least advise the parties of my

present views so that they will have no misunderstanding about them.

Very truly yours,

John F. Grady

United States District Judge

sas

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

| | | |
|---|---|---|
| COPLEY PHARMACEUTICAL, INC., "ALBUTEROL" PRODUCTS LIABILITY LITIGATION, | ) | |
| Petitioner, | ) | |
| v. | ) | No. 95-8032 |
| HONORABLE CLARENCE A. BRIMMER, Chief Judge | ) | |
| Respondent. | ) | |

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**ORDER**

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Before MOORE and ANDERSON, Circuit Judges.

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This is an original proceeding in the nature of mandamus. Petitioner seeks an order compelling the Honorable Clarence A. Brimmer to decertify the national class action pending in the United States District Court for the District of Wyoming, MDL Docket No. 1013. Petitioner also requests a stay of the district court trial set of June 12, 1995, to permit time to address this mandamus petition.

We have reviewed the district court's orders and the materials submitted by petitioner. Upon consideration of petitioner's arguments and the pertinent authorities, we conclude petitioner has not demonstrated adequately that the district court has abused its discretion in denying decertification. We decline

to invoke the "extraordinary remedy" of mandamus. *See Mallard v. United States Dist. Court*, 490 U.S. 296, 309 (1989). The petition for writ of mandamus and the request for stay are denied.

Entered for the Court
PATRICK FISHER, Clerk

By _____
Deputy Clerk

**In re COPLEY PHARMACEUTICAL, INC.,**
**"Albuterol" Products Liability Litigation**

No. 1013.

United States District Court,
D. Wyoming.

April 25, 1995.

ORDER DENYING DEFENDANT'S MOTION TO DECERTIFY THE CLASS AND THE COURT'S TRIAL PLAN

BRIMMER, District Judge.

The above-entitled matter comes before the Court on the Defendant's Motion to Decertify the Class and the Plaintiffs' opposition thereto, and the trial plans submitted by the parties, and the Court, having reviewed the relevant materials on file herein, having heard the oral arguments of the parties and being fully informed in the premises, FINDS and ORDERS as follows:

**Background**

This case involves a national class action product liability lawsuit against Defendant Copley Pharmaceutical, Inc. A history of the case can be found in the Court's Order Granting Partial Class Certification. *In re Copley Pharmaceutical, Inc.*, 158 F.R.D. 485 (D.Wyo.1994). Copley manufactures generic drugs including Albuterol, a bronchodilator prescription pharmaceutical. Copley's Albuterol was the subject of a nationwide recall in January 1994 after contamination was discovered in its Albuterol 0.5% solution. The exact nature, cause and extent of this contamination remains the subject of much controversy and is one of the issues pending before this Court.

Following the recall, Copley was named in a large number of lawsuits filed throughout the United States. Ultimately the Judicial Panel on Multidistrict Litigation consolidated all the federal cases brought against Copley in this Court. On July 18, 1994, this Court held an initial status conference in which it appointed a Plaintiffs' Steering Committee (PSC) to coordinate discovery with *Copley*. The PSC, with some dissention from other plaintiffs' counsel, filed an Amended Class Action Complaint and asked the Court to certify the case of *Holmes, et al. v. Copley*, 94-MD-1503 as a class action.

On October 28, 1994, the Court issued its Order Granting Partial Class Certification. See *In re Copley, supra.* In that Order the Court recognized the presence of several common threshold issues affecting the class: (1) Were the Defendant's manufacturing processes defective? (2) Was the Defendant negligent in its manufacture and distribution of Albuterol? (3) Did the Defendant breach any warranties in selling its product? and, (4) Are pseudomonas *fluorescens* or other possible contaminants dangerous to the human body? *Id.* at 489. The Court also held that individual issues of causation and damages were present and that those issues were not proper for class adjudication. *Id.* at 492. Balancing these considerations under Fed.R.Civ.P. 23(c)(4)(A), the Court certified the class under Fed.R.Civ.P. 23(b)(3) for the following common issues of liability: strict liability, negligence, negligence per se, breach of warranties, and declaratory relief. *Id.* at 493.

The Court's approach was influenced, in part, by a similar holding by Judge Grady in his certification of another partial class action brought by hemophiliacs against blood products manufacturers. See, *Wadleigh v. Rhone- Poulenc Rorer, Inc., et al.*, 157 F.R.D. 410 (N.D.Ill.1994). In the intervening six and a half months, Copley neither appealed this Court's class certification nor moved for reconsideration.

Subsequent to the class certification, this action has moved forward with surprising speed and efficiency. For the most part, counsel on both sides have cooperated to coordinate discovery

and minimize the delays that can plague national products liability actions. *See, e.g. In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.1986), *cert. denied*, 479 U.S. 915, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986). In fact, discovery has continued even though *Copley* has become the focus of a grand jury investigation in Massachusetts. Plaintiffs and the Defendant have cooperated to provide notice to the class, and those wishing to opt-out did so prior to March 15, 1995. Currently the matter is set for a final pretrial conference on May 30, 1995, and trial is scheduled for June 12, 1995.

Pursuant to Management Order Number Six, the parties submitted their trial plans on April 17, 1995. These plans will be discussed in more detail below. Along with its trial plan, Copley filed the pending Motion to Decertify the Class. In that motion, Copley argues that the Court should decertify the class because the Seventh Circuit reversed Judge Grady's class certification in *Wadleigh*. See, *In re Rhone-Poulenc Rorer Inc.*, et al., No. 94-3912, 1995 WL 116310, — F.3d — (7th Cir. March 16, 1995). Based largely on that decision, Copley has submitted two arguments for class decertification. First, Copley contends that its Seventh Amendment rights will be infringed by the Court's bifurcated trial plan. Second, Copley argues that the class is unmanageable because it is impossible for the Court to consider the laws of fifty-one different jurisdictions. Plaintiffs argue in reply that the class certified by the Court is not only constitutional and manageable, but is also the fairest way to resolve the common issues facing the class. Plaintiffs also suggest that the Defendant's motion is motivated by a desire to dissipate the resources of the Plaintiffs, thereby preventing many of them from pursuing claims.

The Court held a hearing on the motion and the trial plans on April 21, 1995. After careful consideration of Copley's arguments, the *Rhone-Poulenc* decision, and the Court's fiduciary duty to the class, the Court is confident that its class certification remains legally sound. In its October order the Court noted the difficulty in deciding whether to certify the class

at that early stage of the litigation. *In re Copley*, 158 F.R.D. at 488. After dealing with this class through many more hours of hearings over the last seven months, the Court is even more convinced that the class certification of some common issues is necessary and judicially efficient.

**I. Defendant Copley's Motion to Decertify the Class**

As mentioned above, Copley's motion to decertify makes two arguments: (1) the Seventh Amendment precludes submitting the elements of liability to separate juries, and (2) a trial would be unmanageable because the Court would be required to apply the differing laws of all fifty states. It is clear from the tone and substance of these arguments that they are inspired by the decision in *In re Rhone-Poulenc*.[1] Therefore, the Court examines *In re Rhone- Poulenc* to explore its applicability to this case.

**A. In re Rhone-Poulenc Rorer, Inc, et al.**

In *Wadleigh, et al. v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410 (N.D.Ill.1994), the United States District Court for the Northern District of Illinois certified a partial class of hemophiliacs for their claims against four different suppliers of blood products.[2] The basis of the plaintiffs' claim in *Wadleigh* was that the defendants were responsible for the plaintiffs' infections with the Human Immunodeficiency Virus (HIV) through defendants' supply of human blood products. *Id.* at 414. The Wadleigh plaintiffs offered two primary theories of liability: (1) even before the defendants knew to test their products for HIV, they should have tested for other viruses which, by their association with HIV, would have prevented much of the contaminated blood from reaching the plaintiffs, and (2) even

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[1] It is unclear, however, how much the timing of this motion was affected by the *In Re Rhone-Poulenc* because *Copley* waited for over one month after the Seventh Circuit's decision to act. With the trial less than two months away, Copley's decision to delay its motion to decertify is somewhat suspect.

[2] The Court will refer to Judge Grady's decision as *"Wadleigh"* to distinguish it from the Seventh Circuit's decision in "Rhone-Poulenc."

after the defendants were aware of HIV, and that it could be transmitted through blood, the defendants failed to properly screen their product and warn their customers.

Despite individual issues of causation, the Court in *Wadleigh* found that common issues of negligence and breach of fiduciary duty were proper for class certification. *Id.* at 426. The court used its authority under Fed.R.Civ.P. 23(c)(4)(A) and certified a partial class to those particular issues. *Id.*

Defendants sought a writ of mandamus from the Seventh Circuit. Writing for the Court, Chief Judge Posner granted the writ and ordered the district court to decertify the class. *Rhone-Poulenc* at *13, at —. Judge Posner reasoned that the proposed trial plan had exceeded the bounds of the trial court's discretion. *Id.* at *7, at —. Judge Posner identified three concerns with the class certified by the district court.

First, the court concluded that even though the defendants had won 92.3% of the previous trials, a class action would force them to settle because a jury of six persons would "hold the fate of an industry in the palm of its hand." *Id.* at *8, at —. Despite Plaintiffs' lack of success at trial, Judge Posner then concluded that if the plaintiffs win at the class trial each member of the class "is apt to receive a judgment in the millions." *Id.*

The second concern expressed in *Rhone-Poulenc* was the district court's ability, or rather presumed inability, to condense the negligence law of different jurisdictions into one jury instruction, which he hinted might even require the use of Esperanto. The court also expressed doubt that the district court could properly apply the plaintiffs' "serendipity" theory of liability.[3] *Id.* at *9, at —. Judge Posner concluded that the nuances present in various states' negligence laws and

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[3] The "serendipity" theory is the first of the *Wadleigh* plaintiffs' two liability theories mentioned above. Basically, the plaintiffs contended that if the defendants had properly screened blood for Hepatitis B and other viruses, they would have screened out much of the blood contaminated with HIV. Rhone-Poulenc at *9, at —.

professional duty of care laws made the class unmanageable. *Id.* The court also suggested that such an effort to condense the various state laws would be a violation of *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

The Seventh Circuit's third concern related the district court's selection of certain issues for class certification. *Id.* at *11, at ----. The court reasoned that the issues of proximate cause and comparative negligence are inseparable from the defendants' negligence. *Id.* at *12, at ----. As a result multiple juries would be considering the issue of the defendants' negligence in violation of the Seventh Amendment and *Gasoline Products v. Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931). Judge Posner wrote that issues may be separated out for class consideration, but "the district judge must carve at the joint." *Rhone-Poulenc* at *11, at ----.

Finally, the majority decision closed with recognition that both the Fifth and Third Circuits had approved approaches similar to Judge Grady's. *Id.* at *13 at ---- citing *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir.1986) and *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.1986), cert. denied, 479 U.S. 915, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986). Nonetheless, Judge Posner closed by saying that the approaches taken by those courts were both unique to asbestos and the subject of much criticism. *Rhone-Poulenc* at *13, at ----. Judge Posner's opinion closed with the conclusion that there were better alternatives which "make[ ] more sense than entrusting the fate of an industry to a single jury." *Id.*

Judge Rovener wrote a vigorous dissent, much of which questioned the appropriateness of a writ of mandamus for an issue such as class certification. *Id.* at *14, at ----. The dissent also criticized Judge Posner's prognostication that each of the plaintiffs would be awarded a seven figure judgment and his consideration of the merits of the plaintiffs' claims. *Id.* at *15, at ----. Judge Rovener went on to say that the majority's concern about submitting class issues to a single jury "is a rationale for amending the rule, not for avoiding its application in a specific

case." *Id.* Judge Rovener closed by admitting that he also had concerns about Judge Grady's trial plan but that "it should be given the opportunity to succeed" and that the trial court has the power to modify or abandon its plan if it becomes unworkable at trial. *Id.* at *16, at ---.

**B. The Applicability of the Rhone-Poulenc decision**

This Court shares Judge Rovener's misgivings about Judge Posner's decision. Moreover, the *Rhone-Poulenc* decision contains a number of legal and logical inconsistencies that lessen its weight in this Court. For the reasons discussed below, the Court finds the *Wadleigh* case factually distinguishable from this case. The Court declines Copley's invitation to follow the Seventh Circuit's application of economic justice to the Federal Rules of Civil Procedure.

The first concern expressed by Judge Posner was the placement of the fate of an entire industry in the hands of a single jury and the apparent lack of merit of the plaintiffs' claims. *Id.* at *7, at ---. First of all, as this Court observed last October, consideration of the merits of the plaintiffs' claims is expressly prohibited when deciding whether to certify a class. *In re Copley*, 158 F.R.D. at 489 citing *Eisen v. Carlisle* and *Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Second, Judge Posner's apprehension that a single jury "will hold the fate of an industry in the palm of its hand" simply is not a legal basis to deny class certification.[4] Such economic reasoning may carry substantial weight in the Seventh Circuit, but this Court must look to Fed.R.Civ.P. 23 and its interpretation by courts to determine the appropriateness of class certification. In any event, in this case a single jury will determine the "fate" of a single company not an entire industry.

The second concern expressed in *Rhone-Poulenc* is the district court's manageability of the laws of various jurisdictions,

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[4] This reasoning also shows a profound mistrust in the jury system. If the defendants have indeed been successful in twelve of thirteen trials, one should have faith that a class jury can also make a fair determination.

especially in light of the plaintiffs' novel "serendipity" theory of liability. *Rhone-Poulenc* at **8-9 at ---- - ----. This Court notes that even Judge Posner conceded "that at some level of generality the law of negligence is one, not only nationwide but worldwide." *Id.* at *8, at ----. Certainly difficulties will be encountered in trying to condense the negligence standards of different jurisdictions, but classes based on such standards have been certified before. *E.g. In re Asbestos School Litigation*, 104 F.R.D. 422 (1984). Most significantly, the plaintiffs in this case do not propose any novel theories of liability, and as will discussed below, many traditional strict liability and negligence defenses may be irrelevant in this case.

The Seventh Circuit's third "concern" is no more persuasive to this Court. Judge Posner reasoned that the class issue of the defendants' negligence was inseparable from the issues of proximate cause and comparative negligence. *Rhone-Poulenc* at **11-12, at ---- - ----. Unlike the *Wadleigh* case where some of the plaintiffs allegedly continued using blood products after the HIV danger was known, comparative negligence is unlikely to be a defense in this case. Unless a particular plaintiff used contaminated Albuterol after the recall, it is difficult to see how an individual plaintiff could be comparatively negligent by her use of Albuterol. Furthermore, Judge Posner's analysis effectively eviscerates Fed.R.Civ.P. 23(c)(4)(A). As this Court noted last October, the advisory note to that rule suggests the same separation of liability and injury issues proposed by the Court. *In re Copley*, 158 F.R.D. at 491, n. 1, citing Official Comment to Fed.R.Civ.Pro. 23(c)(4)(A).[5]

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[5] That comment states, "This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; members of the class may thereafter be required to come in individually and prove the amounts of their respective claims." Under the Court's similar proposal, the class trial would establish Copley's liability to the class certified by the Court, which includes "all persons who suffered damages as a result of inhalation of Albuterol manufactured, supplied, distributed or placed in commerce by Copley

As Judge Rovener's dissent argued, the majority's concerns are focused more on the soundness of Fed.R.Civ.P. 23(c)(4)(A) than on its application in *Wadleigh*. *Rhone-Poulenc* at *15, at ---. Unlike Judge Posner, this Court finds Fed.R.Civ.P. 23(c)(4)(A) a highly efficient way to preserve both judicial economy and the rights of the parties in the case. Judge Posner directs that, when separating out common issues, district courts must "carve at the joint." *Id.* at *11, at ---. However, the effect of his decision takes away one of the sharpest instruments available to trial courts managing mass tort litigation.

Finally, this Court observes than many of the economic factors that seem to be the real driving force behind the *Rhone-Poulenc* decision are not present here. This case does not involve an entire industry and a wide range of products, but a single company and single product. This case does not involve novel theories of hindsight liability, but instead concerns a defendant who has admitted that some of its product was contaminated and that it is liable for any resulting injuries. Furthermore, even in October the Court noted that this case is not complicated by the foreseeability and professional standard of care issues present in *Wadleigh*. *In re Copley*, 158 F.R.D. at 492. Simply put, this Court in unpersuaded by the decision in *Rhone-Poulenc*. On the contrary, seven months after its initial certification, the Court is even more convinced of its class certification of the common factual issues of liability.

### C. Defendant's Copley's Arguments in Favor of Decertification

Even though Copley bases much of its motion to decertify on the *Rhone-Poulenc* decision, Copley's contentions go beyond that case. Therefore, the Court will address Copley's arguments regarding the constitutionality and manageability of the class certified below.

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Pharmaceutical, Inc." Under the Court's trial plan, if the Plaintiffs are successful at the class trial, Plaintiffs would essentially be proving their membership in the class by a showing of individual causation.

### 1. Constitutional Concerns

#### a. Generic Causation

Under the Court's trial plan detailed below, there will be two phases: (1) a trial of common underlying factual issues to determine Copley's liability, if any, to the class, and (2) separate trials in the transferor districts where Plaintiffs will have to prove, through a showing of individual causation, that they are in fact members of the class *as defined by the Court.*[6]

Through this approach the Court recognizes that there are common issues concerning the extent, nature and dangerousness of the contamination in Copley's Albuterol. Even Copley's proposed trial plan admits this much. Defendant's Proposed Trial Plan, pp. 5-6. For example, a threshold common issue that will have to be proved by every Plaintiff is whether the contaminants in Albuterol are harmful to the human body. Defendant contends that it would be unconstitutional for one jury to consider whether its Albuterol can injure a user and a second jury to consider whether a particular Plaintiff was in fact so injured. The main authorities cited by *Copley* for this proposition are *Rhone-Poulenc* and *Gasoline Products*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931). In *Gasoline Products*, the Supreme Court held that under the Seventh Amendment, a second jury can consider an issue related to a prior jury's verdict only if it "is so distinct and separable from the others that a trial of it alone may be had without injustice." 283 U.S. at 500, 51 S.Ct. at 515. Therefore, the Court examines whether the general issues of causation are "distinct and separable" from the issues of individual causation.

At the outset, the Court observes that *Gasoline Products* predates the Federal Rules of Civil Procedure. Thus, one can

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[6] Although the Court and the parties have referred to separate issues of generic cause and proximate cause, a more accurate description of the division of liability envisioned by the Court is "general causation", that is the ability to cause harm, and "individual causation", the harm, if any, to a particular plaintiff.

conclude that the comments from the Fed.R.Civ.P. 23(c)(4)(A) and the Manual for Complex Litigation endorsing the separate treatment of liability issues considered the requirements of *Gasoline Products*.[7] The Court also recognizes that there are numerous cases where courts have separated out general issues of causation and liability from individual issues of injury and damages. These cases suggest that the Seventh Circuit's approach to Fed.R.Civ.P. 23(c)(4)(A) is the exception rather than the rule.

Perhaps the case most factually similar to the Court's trial plan is *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir.1988). In *Sterling* the plaintiffs brought a class action against a single defendant claiming that their land had been contaminated by toxins which had migrated from the defendant's landfill. *Id.* at 1193. The district court certified the class and held a bench trial on the claims of representative class members. *Id.* at 1194. Under the trial court's plan, it deferred individual issues of causation and injury of other class members for later hearings. *Id.* at 1194. After the district court held the defendant liable and awarded individual damages to the representative plaintiffs and punitive damages to the class, defendant Velsicol appealed. *Id.* Among *Velsicol's* arguments on appeal were its contentions that common issues did not exist to justify class certification. *Id.* at 1196.

The Sixth Circuit observed that district courts enjoy broad discretion in certifying a class and that their plans should not be overturned absent an abuse of discretion. *Id.* at 1197. The Sixth Circuit then affirmed the district court's approach, reasoning,

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[7] The Manual For Complex Litigation, 2d, advises, "The provision authorizing a class for specific "issues" does not require that an entire claim by or against a class be certified. Several courts have assumed that class action treatment might be afforded one or more issues relating to liability, while denying (or deferring consideration of) class certification of other issues affecting liability or questions of damages." MCL 2d s 30.17. At a footnote to this provision, the Manual suggests that the separation of common liability issues from individual issues "appears to have been the intention of the drafters of [Fed.R.Civ.P. 23(c)(4)(A) ]." *Id.* at n. 39.

where the defendant's liability can be determined on a class-wide basis because the cause of the disaster was a single course of conduct which is incidental to each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy. In the instant case, each class member lived in the vicinity of the landfill and allegedly suffered damages as a result of ingesting or otherwise using contaminated water. Almost identical evidence would be required to establish the level and duration of chemical contamination, the causal connection, if any, between the plaintiffs' consumption of the contaminated water and the type of injuries allegedly suffered, and the defendant's liability. The single major issue distinguishing the class members is the nature and amount of damages, if any, that each sustained. To this extent, a class action in the instant case avoided duplication of judicial effort and prevented separate action from reaching inconsistent results with similar, if not identical, facts. The district court clearly did not abuse its discretion in certifying this action as a Rule 23(b)(3) class action. However, individual members of the class still will be required to submit evidence concerning their particularized damage claims in subsequent proceedings. *Id.* at 1197. While this case involved a bench trial, this Court finds it significant that the Sixth Circuit did not even consider whether separate proceedings on general causation, individual causation, damages and injuries were constitutionally suspect.

A court that did consider, and reject, a constitutional challenge to a class certification like the one in the instant case was the Ninth Circuit in *Arthur Young & Co., et al. v. United States District Court*, 549 F.2d 686 (9th Cir.1977), cert. denied, 434 U.S. 829, 98 S.Ct. 109, 54 L.Ed.2d 88 (1977). In an action based on securities fraud, a district court certified a class for general liability but separated out individual issues including reliance, causation, laches, waiver, estoppel and ratification. *Id.*

at 690.[8] Defendants sought a writ of mandamus arguing, in part, that the district court's separation of class and individual issues violated the Seventh Amendment and the Supreme Court's decision in *Gasoline Products*. *Id.* at 692-693. The Ninth Circuit rejected that argument and concluded that *Gasoline Products* protected the substance and not the form of the right to a jury trial. *Id.* at 693. The court concluded, "[a]ssuming the first trial is heard and the class issues determined by one jury, as had been requested by the defendants, we perceive no absolute bar, constitutional or otherwise, to resolution of any remaining issues before either the same or a second jury." *Id.* (footnote omitted).

This Court observes that since the decision in *Arthur Young & Co.*, there has been no intervening Supreme Court decisions or changes in the Federal Rules of Civil Procedure that could explain the Seventh Circuit's decision in *Rhone-Poulenc*. On the contrary, since the Ninth Circuit's decision in *Arthur Young & Co.*, several other circuits have endorsed the separate treatment of class and individual issues. For example in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.1986), *cert. denied*, 479 U.S. 915, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986), Judge Weis upheld a district court's certification of common issues of liability for a Rule 23(b)(3) class.[9] *Id.* at 1010. Judge Weis reasoned that, "[d]etermination of liability issues in one suit may represent a substantial savings in time and resources." Id. at 1008. He also observed, [r]eassessment in the utility of the class action in the mass tort area has come about, no doubt, because

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[8] At oral argument Copley's counsel tried to distinguish this case because it was premised on federal law, not state law. The nature of the cause of action is irrelevant to the consideration of the constitutionality of class certification for particular issues.

[9] During oral argument Copley's counsel argued that many of the cases involving asbestos were distinguishable because they involve property damage, not personal injury. While that may be true, the elements and standard of proof do not differ for torts involving property and personal injury. Therefore, this distinction is irrelevant.

courts have realized that such an action need not resolve all the issues of litigation. See Fed.R.Civ.P. 23(c)(4)(A). If economies can be achieved by use of the class device, then its application must be given serious and sympathetic consideration. *Id.* at 1008-1009. Finally, Judge Weis endorsed the trial court's view that common factual issues involving the health hazards of asbestos, "would not vary widely from one class member to another." *Id.* at 1009. As a result, class treatment of those issues was appropriate. *Id.*

In *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, *rehearing denied*, 785 F.2d 1034 (5th Cir.1986), the Fifth Circuit affirmed the trial court's decision to try common issues of liability followed by "mini-trials" representing the claims of individual plaintiffs. *Id.* at 472-472. The court stated, "necessity moves us to change and invent. Both the *[In re] Agent Orange [Product Liability Litigation*, 506 F.Supp. 762 (E.D.N.Y.1980) ] and the *Asbestos School* courts found that specific issues could be decided in a class 'mass tort' action--even on a nationwide basis. We approve of the district court's decision in finding that this 'mass tort' class could be certified." *Id.* at 473.

The Fourth Circuit took a similar approach in a case against the insurer of the manufacturer of the Dalkon Shield. *See In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir.1989), *cert. denied*, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989).[10] After what may be the most comprehensive review of the law of class actions to be found in the Federal Reporter, the Fourth Circuit made several observations. Among these observations are that "the 'trend' is once again to give Rule 23 a liberal rather than restrictive construction" and "in order to promote the use of the class device and to reduce the range of disputed issues, courts

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[10] At oral argument defense counsel tried to distinguish this case because the defendant was not a products liability manufacturer but an insurance company. Considering that the action charged that Aetna Casualty and Surety was a joint tortfeasor for the manufacture of the Dalkon Shield, this Court finds little reason to disregard its precedent. *See In re A.H. Robins Co., Inc.*, 880 F.2d at 710.

should take full advantage of the provision in subsection (c)(4) permitting class treatment of separate issues in the case." *Id.* at 740. After the broad endorsement of the innovative use of Rule 23, and after noting the "uniqueness" of the Dalkon Shield case, the court went on to affirm the district court's certification of a Rule 23(b)(1)(B) and (c)(4) class. *Id.* at 740-741.

Apparently finding that Dalkon Shield was not so unique after all, the Fourth Circuit took a similar approach four years later in *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir.1993). In that case the court affirmed a district court's certification of a class under Fed.R.Civ.P. 23(c)(4)(A) for issues common to a class of colleges and universities seeking damages from asbestos manufacturers. *Id.* at 190. In fact, the court praised the district court's identification of common liability issues, stating, "[s]ignificant economies may be achieved by relieving educational institutions of the need to prove over and over when defendants knew or should have known of asbestos' hazards, or whether defendants engaged in concerted efforts to conceal this knowledge." *Id.* at 185.

Thus, between 1977 and 1993, the Third, Fourth, Fifth, Sixth and Ninth Circuits have all used class certification for common issues of liability as a step forward in managing "mass torts." Significantly, none of those courts held that such an approach had any constitutional infirmities whatsoever. This Court chooses to join those courts in their progressive treatment of mass torts and disagrees with the Seventh Circuit's decision to take a massive leap back to the time before Rule 23 class actions. The weight of the current law demonstrates that the Seventh Amendment is not violated by the separation of common issues of liability for class treatment.

The Court's trial plan detailed below offers two phases of litigation that each involve "distinct and separable" issues and, as a result, the Seventh Amendment is preserved. *Gasoline Products*, 283 U.S. at 500, 51 S.Ct. at 515.

### b. Application of Different State's Laws

The heart of Copley's arguments concerning the application of laws from different jurisdictions comes in its argument that the class is unmanageable. However, Copley also contends that consideration of different standards of liability violates the Constitution. Despite *Rhone-Poulenc's* holding that Judge Grady's approach would be unconstitutional, in many of the cases discussed above the courts approved nationwide classes and did not find that the difference in state laws made such an approach unconstitutional. *E.g. In re Asbestos School Litigation*, 104 F.R.D. 422, 434 (E.D.Pa.1984), modified, 789 F.2d 996 (3d Cir.1986), *cert. denied*, 479 U.S. 915, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986), (holding that "substantial duplication" of negligence and strict liability laws in fifty-one jurisdictions make nationwide class manageable). For example, when presented with a nationwide class in *In re School Asbestos Litigation*, the Third Circuit did not even consider-- much less agree with--an argument that the district court's approach was unconstitutional. *In re School Asbestos Litigation*, 789 F.2d at 1010. Confident that the Seventh Circuit may be out of step with its sister circuits, this Court will turn to *Copley*'s primary argument about differing state laws: that they make the class unmanageable.[11]

### 2. Manageability of the Class

*Copley* raises a very real concern that the laws of the different state jurisdictions make a trial unmanageable. In addition to the *Rhone-Poulenc* decision, *Copley* contends that states' differing approaches to products liability makes the certification of a nationwide class unmanageable. See generally, William C. Powers, *The Persistence of Fault in Products Liability, 61* TEX.L.REV. 777, 779-881 (1983).

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[11] Currently the Court has sixty-six cases transferred to it from twenty-three different jurisdictions. However, under the Court's class definition there may be class members from up to fifty-two jurisdictions (counting the District of Columbia and Puerto Rico) depending on whether the non-diverse plaintiffs from Massachusetts are included.

For their part, the Plaintiffs give numerous examples of courts who were undeterred by the specter of differing standards of negligence and product liability. Most notable among these was *In re Asbestos School Litigation*, where Judge Kelly observed that "51 jurisdictions are in virtual agreement in that they apply the Restatement (Second) of Tort § 388" and "forty seven jurisdictions have adopted strict liability and all of them start with the concept of a defective product." 104 F.R.D. at 434. *See also*, *In re Lilco Securities Litigation*, 111 F.R.D. 663, 670 (E.D.N.Y.1986) (application of law of all fifty states does not make class "per se unmanageable"); and *In re Cordis Corporation Pacemaker Product Liability Litigation*, MDL No. 850 (S.D.Ohio, Dec. 23, 1992) (Slip. Op. at 35) (concluding that even though the source of liability laws may differ, the substance of these laws does not vary greatly).

This differing authority leads the Court to conclude that the decision whether to attempt to manage a class under differing laws is committed to the discretion of the trial court. *See Reed v. Bowen*, 849 F.2d 1307 (10th Cir.1988) (class certification committed to the discretion of trial court).

Furthermore, several factors make this class an excellent candidate for the application of law to a nationwide class. First, this case involves only one defendant manufacturer, Copley Pharmaceutical, and, at the present time, only one product, Albuterol 0.5%. Second, the product in question is safely manufactured by many other generic drug companies. Third, Copley, through its counsel, has admitted that at least some of its Albuterol was contaminated and that it is liable for any injuries such contamination may have caused.

Because of these facts, many of the "nuances" in state negligence and products liability laws may be irrelevant in this case. For example, comparative negligence, a defense that varies throughout the states, will only be relevant in the rare cases where a plaintiff used Albuterol after the recall. Similarly, the traditional strict liability defenses of risk/utility, state of the art and assumption of the risk are irrelevant because Copley has

admitted that it is liable for any injuries caused by its Albuterol. As detailed in the Court's trial plan below, if an individual state's law is at variance with the general law on a relevant point of law, its residents may be removed from the class. Therefore, the Court is not intimidated by the parade of horribles presented by the Defendant.

Finally, Copley's counsel repeatedly argued that there was not a single case where a trial was held in a mass tort case which applied the laws of all fifty states. But the absence of an example does not prove that such classes are per se unmanageable. The fact is that most class actions settle and few go to trial whether the class is nationwide or statewide. This Court might indeed be the first to take such a class action to trial, but based on the policy reasons discussed below, the Court is ready to take on that challenge.

**3. Policy Reasons Supporting a Class Action**

In its Order Granting Partial Class Certification, this Court stated that the most convincing reason for certification was not offered by Plaintiffs' lead counsel, but by a single attorney in less than a minute. *In re Copley*, 158 F.R.D. at 492. During oral arguments concerning class certification, one attorney approached the Court from the back of the courtroom. He succinctly stated that he had six clients, none of whom had large claims against Copley. He said that without class certification his clients would essentially lose their claims because neither he nor his clients had the resources to sue a large defendant like Copley. *Id.*

Seven months later, after hearing the arguments on decertification, the compelling argument made by this attorney still rings true in the Court's ears. Plaintiffs' counsel repeated this point when they suggested that the real motivation behind Copley's motion to decertify was to cripple the claims brought by individual plaintiffs with less experienced counsel. Copley may or may not have such a goal, but the Court agrees that if the

class is decertified, the courthouse door could be slammed on a great many plaintiffs.

Given Judge Posner's recent decision in *Rhone-Poulenc*, it is ironic that over fifty years ago, it was the Seventh Circuit which recognized, to permit the defendant to contest liability with each claimant in a single separate suit would, in many cases, give defendants an advantage which would almost be equivalent to closing the door of justice to small claimants. This is what we think the class suit practice was to prevent. *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir.1941).

Today, in the era of "mass torts" many commentators agree that class actions are necessary to protect the interests of individual plaintiffs. One such commentator has observed, The case by case mode of adjudication magnifies this burden [of litigating complex issues] by requiring the parties and courts to reinvent the wheel for each claim. The merits of each case are determined *de novo* even though the major liability issues are common to every claim arising from the mass tort accident, even though they may have been previously determined several times by full and fair trials. These costs exclude many mass tort victims from the system and sharply reduce the recovery for those who gain access. Win or lose, the system's private law process exacts a punishing surcharge from defendant firms as well as plaintiffs.

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In addition, the case-by-case, individualized processing of the mass tort claims that are filed confers a strategic edge upon defendant firms. While it prevents victims from deriving the benefits of a concerted action, the traditional process has no similar effect on the capacity of the defendant firms to spread litigation costs and prepare the common questions efficiently for a once-and-for-all basis. David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND.L.J. 561, 563-564, 570-571 (1987) (footnotes omitted). The author has also recognized, Class treatment, moreover, has been

extended solely to common questions of law and fact concerning liability, preserving the right to an individual trial on damages. In some cases courts have gone slightly beyond the conventional bifurcation of liability and damage elements of the tort cause of action. They have instead designated certain common liability issues for class treatment, while remanding the remaining liability questions related to the circumstances of each member to an individual trial before, or along with, determination of damages. *Id.* at 568-569. (Footnotes omitted).

Numerous other commentators have recognized the benefit of class certification for common issues of liability. *E.g.* Wright & Miller, *Federal Practice and Procedure*: Civil 2d s 1783, p. 76. Some practitioners have also observed the value of use of class actions to conserve the resources of plaintiffs, defendants and the courts. *E.g.* Marc Z. Edell, *Resolution of Mass Tort Litigation: A Practitioner's Guide to Existing Methods and Emerging Trends*, C949 ALI-ABA 37 (1994) and Sheila Birnbaum, *Case Management of Mass Tort Litigation*, 406 PLI/Lit 27 (1991).

Finally, *Copley* directs the Court to the infamous Advisory Committee Note to Fed.R.Civ.Pro. 23. That advisory note, a favorite among class action defendants, states, "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for class action." However, this note was written nearly thirty years ago, before the advent of most "mass tort" litigation. As the Plaintiffs point out, even one of the authors of that note has repudiated it: I was an ex-officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying mass torts are inappropriate for class certification. I thought then that was true. Unless we can use the class action and devices built on the class action, our judicial system is simply not going to be able to cope with the challenge of the mass repetitive wrong that we see in this case and so many others that have been mentioned this morning and afternoon. H. Newberg, *Newburg on Class Actions*, § 17.06 (3d Ed.1992)

quoting Professor Charles Allen Wright, *In re School Asbestos Litigation*, Master File 830268 (E.D.Pa.) Class Action Argument, July 30, 1984, Tr. 106. In the world of practice, it is now generally accepted that the committee's note is outdated. See, Pamela Coyle, *When Bigger Isn't Better*, AMERICAN BAR ASSOCIATION JOURNAL, March 1995, at 72.

After many months of discovery, the able litigators on both sides of this case are well-versed in Copley's Albuterol and its contamination. Just as Copley will have the best counsel available, the Plaintiffs deserve to have counsel who are familiar with Albuterol, its manufacture and its contamination. In this way the truth about the common issues liability may be decided in one class trial. The Court's October 28, 1994 Order Granting Partial Class Certification stands and the Defendant's Motion to Decertify the Class is DENIED.

**II. The Court's Trial Plan**

**A. Punitive Damages**

Both parties have submitted excellent briefs on the point of the alleged punitive conduct of Copley and whether the Court should try such conduct at the class trial. However, the Court is persuaded by Copley's two threshold arguments that the issue of punitive conduct cannot be added to the class issues to be tried in June. First and foremost, the notice to the class did not inform its members that punitive conduct would be tried. Therefore, it would be manifestly unjust to bind the class to the outcome of punitive issues without giving class members an opportunity to opt-out from the class. *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1104 (5th Cir.1977) (due process requires adequate description of proceedings in notice given to members of a Rule 23(b)(3) class).

Secondly, in its October Order, the Court observed that punitive damages were inappropriate for class certification because they depend on an individual's injury and compensable damages. *In re Copley*, 158 F.R.D. at 492. Plaintiffs have since suggested that punitive conduct, that is whether Copley was

willful and wanton or reckless, could at least be determined on a classwide basis. As attractive as this proposition is, punitive damages are measured, in part, by how outrageous such punitive conduct is relative to a particular plaintiff. *TXO Production Corp. v. Alliance Resources Corp.*, — U.S. —, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). Therefore, it is necessary for the jury which is to determine the amount of punitive damages, if any, to consider how outrageous a particular defendant's conduct may be. The Court concludes, as it did in October, that punitive damages and punitive conduct should be determined on an individual basis.

**B. Bellwether Plaintiffs**

At the status conference on March 17, 1995, the Court raised the possibility of adding the cases of bellwether plaintiffs at the class trial in June. At that hearing both parties agreed to explore such a possibility in their trial plans. While the Plaintiffs have submitted a proposal for the use of bellwether plaintiffs and nominated possible candidates, Copley has objected to such an approach. The Court decides against the use of bellwether plaintiffs for three reasons. First, at this late stage in the litigation the Court believes that it would be unfair to change, without Copley's consent, the identity of the individuals whose cases will be tried in June. Second, even though the Plaintiffs claim that Copley has adequately discovered the cases of the proposed bellwether plaintiffs, Copley insists such discovery is not complete. The Court will give Copley the benefit of the doubt on this issue. Third, the Court may replace named representative plaintiffs at any time. *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, *rehearing denied*, 712 F.2d 1416 (5th Cir.1983). However, the Court must have a sufficient reason to name new class representatives and no concrete reasons have been given to the Court that would justify changing the parties to this case less than two months before trial. The case will proceed with the named representatives that the Court approved last October.

**C. Generic Causation**

Again, Copley has admitted that four batches of its Albuterol were contaminated and that it is liable for any injury resulting from that contamination. Copley's posture throughout this litigation has been that none of the contaminants present in its Albuterol are capable of causing injury in human beings. Thus, it is ironic that Copley itself has created the best argument for general causation. Copley has presented the Court with a defense of lack of general causation.

As discussed above, the Court concludes that a jury may constitutionally consider some issues of general causation that focus on the extent and nature of the contamination in the Defendant's Albuterol. Based on these factual findings, a jury may determine whether the contaminants proved to be in Copley's Albuterol can be harmful to human beings.

**D. Issues to be tried**

The trial plan proposed by the Court is subject to modification at the final pretrial conference which is currently scheduled for May 30, 1995. The Court proposes a two-phase trial plan:

**1. Class Trial**

**a. Class Representatives' Claims**

The Court begins with the simplest factor: all claims for relief made by the seven class representatives in the Amended Master Class Action Complaint will be tried under the choice of law rules of the State of Ohio. Furthermore, the jury will hear evidence of both compensatory and punitive damages for each of the class representatives. The goal of this trial will be to determine if Copley is indeed liable to the class as defined by the Court.

**b. Common Factual Issues**

In addition to deciding the individual cases of the class representatives, the jury will consider the following factual issues: (1) To what extent was Copley's Albuterol contaminated?

(a) What batches were contaminated? (b) What were the contaminants present? (2) Using the class representatives as models, are those contaminants capable of causing damage to the human body? (3) Was Copley's Albuterol defective? (a) Was Copley's Albuterol defective in its design or manufacture? (b) Did the contamination in Copley's Albuterol make it an "unreasonably dangerous" product? (4) Was the defendant negligent in allowing the contaminants into its product? (5) Did the defendant violate the Food, Drug & Cosmetic Act or the regulations promulgated thereunder? (6) Did Copley breach express or implied warranties by its sale of contaminated Albuterol?

During the course of the trial, the Court will also consider evidence relevant to the Plaintiffs' request for the equitable remedy of medical monitoring. Such evidence should not only relate to the need for such monitoring, but also the scope and duration of a monitoring program. However, because of the equitable nature of medical monitoring, this issue should not be submitted to the jury.

The answer to the above questions will be binding on Copley and those who can carry their burden of proof in Phase II of the trial plan.

During this class trial, the Court will consider the relevant law of negligence, breach of warranty and strict product liability from all necessary jurisdictions. If the law of a particular state appears to be idiosyncratic, the residents from that state can be excised from the class. For example, if it is shown that the law of State of Idaho includes a relevant defense to product liability that conflicts with other jurisdictions, the Court will redefine the class to exclude Idaho residents. Even if such idiosyncrasies remove half the jurisdictions in the United States, which the Court believes is highly unlikely, the application of common issues concerning the other twenty- five states should conserve judicial and litigation resources for all involved.

The Court's approach may be simplified by various states' differing approaches to products liability. For example, in products liability actions, both North Carolina and Virginia apply theories of implied warranties rather than strict product liability. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980) and *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55 (1988). Conversely, Louisiana's Products Liability Act, which is based on a showing that a product is "unreasonably dangerous", is the exclusive remedy for injuries from products in that state. La.Rev.Stat. s 9:2800.51 et seq. Therefore, the jury's finding on implied warranty may be decisive in one state and irrelevant in another.

**2. Phase II: Individual Suits**

Following the trial on the class issues and the claims of the individual representative plaintiffs, if the Plaintiffs prevail in any significant way, the Court will thereupon return the cases to their transferor districts.

Upon return, the transferor courts may then hold trials where plaintiffs will prove their membership in the class. Assuming the plaintiffs are successful at the class trial and Copley is found liable, individual plaintiffs will then have the burden of proving, under their local law, that they were in fact injured by the Defendant's product. Also at the trials, individual plaintiffs will present their claims for compensatory and punitive damages. While these trials will focus on issues of individual causation, plaintiffs will in fact be proving that they are members of the class because they, or those they represent, suffered damages because of Copley's Albuterol.

**CONCLUSION**

After a thorough examination of the Seventh Circuit's decision in *Rhone-Poulenc* and Copley's constitutional arguments, the Court concludes that Copley's concerns are unfounded. While the Court's division of issues is somewhat innovative, it is believed to be based on legal precedent and

promises to streamline the litigation in this case. The Court's proposed trial plan will resolve this case through two phases that balance the common issues of liability with the individual issues of causation, injury and damages.

Finally, the Court has carefully considered the suggestion that the Court continue the trial date until the fall to allow more time for counsel to review the evidence. There is more than six weeks between this date and the trial date which, given the large force of legal help available, should be adequate for the task of digesting the document discovery and purging the video depositions of extraneous matters. Counsel on both sides are now immersed completely in the case and probably will never be more ready to try it. The Court has therefore concluded that it will let the trial date of June 12, 1995 stand.

Therefore, it is ORDERED, that the Defendant's Motion to Decertify the Class be, and the same hereby is, DENIED; It is further,

ORDERED, subject to modification at the final pretrial conference, the issues to be tried in this case are those outlined above.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 94-7118

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IN RE: BAUSCH & LOMB INCORPORATED,

Petitioner,

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On Appeal from the United States District Court for the Northern District of Alabama

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BEFORE: KRAVITCH, HATCHETT and BARKETT, Circuit Judges

BY THE COURT:

Petitioner's petition for writ of mandamus is DENIED.

Nos. 92-3420/346

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
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| In re: BREAST IMPLANT LITIGATION | ) | **ORDER** |

BEFORE: KEITH and SUHRHEINRICH, Circuit Judges, and PECK, Senior Circuit Judge.

Two cases are before this court relating to the breast implant litigation pending in the Southern District of Ohio. In Case No. 92-3420, an intervenor-plaintiff appeals the district court's order granting class certification in this matter. The class plaintiffs have moved to dismiss the appeal, requesting an expedited consideration, and the appellant responds in opposition. The class plaintiffs reply in support of the motion to dismiss. In Case No. 92-3462, the petitioners, plaintiffs in a similar action in the Northern District of California, seek a writ of mandamus staying the district court from any further proceedings. They also ask this court to direct the district court to vacate orders which certify a class, appoint lead counsel, direct class notice procedures, and schedule discovery and trial. The petitioners also move to stay the implementation of class notice pending consideration of this matter. The class plaintiffs request expedited consideration of this petition, and have asked for the assessment of sanctions.

Orders concerning class certification are inherently tentative in nature since they may be revisited at any time prior to final judgment. As such, they are not immediately appealable as collateral matters. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *see also In re Bendectin Products Liability Litigation*, 749 F.2d 300, 304 (6th Cir. 1984). The plaintiff-appellant in

Case No.92-3420 agues that the district court's order of certification is injunctive in nature and cites *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) in support of her immediate appeal. However, in the *Skywalk* cases, the certified class was mandatory. Clearly the order in the instant case is conditional, which is apparent both from its terms and the district court's statements on the record. As such, it is not subject to an immediate, direct appeal. The motion to dismiss is granted.

Mandamus may be an appropriate avenue of review where a party has no other adequate means, such as a direct appeal, to attain relief. *Bendectin*, 749 F.2d at 304. The petitioners in Case No. 92-3462 so argue in support of their petition. However, the remedy of mandamus is a drastic one. It may be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661-62 (1978); *Kerr v. United States District Court*, 426 U.S. 394, 402-03 (1976). Having reviewed the argument in this matter, we find the petitioners have failed to demonstrate such a clear and indisputable right to relief. We conclude, therefore, that the petition for a writ of mandamus must be denied.

It therefore is ORDERED that the motion to dismiss Case No. 92-3420 is granted. It further is ORDERED that the petition for a writ of mandamus docketed as Case No. 92-3462 is denied. Fed. R. App. P. 21(b). The petitioners' motion to stay class notice pending consideration of this matter is denied as moot. No sanctions are assessed.

ENTERED BY ORDER OF THE COURT

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Clerk

**§1291. Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeal from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

**§1292. Interlocutory decisions**

(a) except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as

to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d) (1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4) (A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the

Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that it is not otherwise provided for under subsection (a), (b), (c), or (d).

**§ 1651. Writs**

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. (As amended May 24, 1949, c. 139, § 90, 63 Stat. 102.)

**Rule 23. Class Actions**

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings

include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, willinclude all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was

directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues; or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4)requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. (As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)